

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,

Plaintiff,

Civil Action
No. 14-14176-ADB

v.

October 19, 2018

PRESIDENT AND FELLOWS OF HARVARD
COLLEGE, et al.,

Pages 1 to 261

Defendants.

TRANSCRIPT OF BENCH TRIAL - DAY 5
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MA 02210

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Allison D. Burroughs, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on October 19, 2018.)

THE COURT: How are you?

MR. McBRIDE: Doing well. How are you?

THE COURT: I told Mr. Mortara yesterday my back is starting to bother me. I don't know if your backs are starting to bother you, but you can all feel free to stand up and back and move around a little bit if we're sitting too long, and I may be back and forth doing the same.

In terms of this morning's schedule, I have a conference in another case at noon. I'm not doing it in this courtroom. I moved it to another courtroom so that we didn't disrupt the function or the paperwork in here or whatever. So I'm happy to go straight through to a few minutes before 12:00. I'm also happy to take a morning break, so do whatever you all want. But the afternoon break will be from like five of 12:00 to, hopefully I can hold it to 45 minutes. Okay. But it might be a little bit longer. So if you want a break, go ahead and let me know and take one. But if you want to go straight through, that's fine, too.

1 Just a reminder, you're still under oath okay.

2 THE WITNESS: Yes.

3 (ERICA BEVER previously sworn by the Deputy Clerk.)

4 EXAMINATION (resumed)

5 BY MR. McBRIDE:

6 Q. Good morning, Ms. Bever.

7 A. Good morning.

8 Q. I want to move ahead from October of 2013 into 2014.

9 MR. McBRIDE: And I'm going to put on the screen
10 Plaintiff's Exhibit 41. And I'd like to offer that into
11 evidence, please.

12 MS. ELLSWORTH: No objection.

13 THE COURT: It's admitted.

14 (Plaintiff Exhibit No. 41 admitted.)

15 BY MR. McBRIDE:

16 Q. And do you recall that in July of 2014, before you left
17 OIR, Dean Khurana took his current position as the dean of
18 Harvard College?

19 A. Yes.

20 Q. I have here Plaintiff's Exhibit 41 on the screen. This
21 is an email from you to Erin Driver-Linn on July 10 of 2014.

22 A. Yes.

23 Q. And it copies your colleagues, John Scanlon and Liam
24 Schwartz?

25 A. Yes.

1 **Q.** This email, this was about a meeting that you had the
2 next day with Dean Khurana to introduce him to your office
3 and the work OIR had done relating to Harvard?

4 **A.** Yes.

5 **Q.** And you see here you've written, "Hi, Erin. I've
6 attached a draft agenda for tomorrow's meeting with Dean
7 Khurana. Does this look right to you? I'm also attaching
8 the additional college-related materials we should probably
9 share with him."

10 Do you see that?

11 **A.** I do.

12 **Q.** The other people who attended the meeting with Dean
13 Khurana was your boss, Erin Driver-Linn, as well as the two
14 co-workers listed here, Mr. Scanlon and Mr. Schwartz?

15 **A.** Yes, I believe that's correct.

16 **Q.** And you see that the email list four attachments: agenda
17 for Khurana, document low-income admission memo final,
18 factors in admission, and athletes project.

19 Do you see those attachments?

20 **A.** I do.

21 **Q.** If you page to the next page in Plaintiff's Exhibit 41 --
22 I'll blow it up here on the screen. Is this the agenda
23 that's attached for the meeting with Dean Khurana the next
24 day?

25 **A.** It appears to be, yes.

1 **Q.** You see the three main points that you are proposing
2 discussing with Dean Khurana are additional OIR analysis on
3 Harvard College students? That's the first bullet point?

4 **A.** Yes.

5 **Q.** And under there what you've written is --

6 THE COURT: Mr. McBride, I have a bunch of redacted
7 pages. Do I have the wrong exhibit?

8 MR. McBRIDE: No, Your Honor. You have the correct
9 exhibit. But the very second page after the email is the
10 agenda I'm looking at.

11 THE COURT: I see that double-sided. Okay. Go
12 ahead. Sorry.

13 BY MR. McBRIDE:

14 **Q.** Under the additional OIR analysis on Harvard College
15 students, the subpoints are athletes, evaluating factors in
16 admissions, and low-income admissions memo. Do you see that?

17 **A.** I do.

18 **Q.** And then the next two main bullet points are trends in
19 higher education for the Harvard Corporation, and finally
20 discussion of OIR work and potential new projects. You see
21 that?

22 **A.** Yes.

23 **Q.** And if you would page through with me, as Her Honor
24 noted, there's a number of redacted pages of the additional
25 attachments going back. Do you see that?

1 **A.** Yes.

2 **Q.** But if you go to page 47 -- and we've provided some page
3 numbers there at the very bottom pages. This one, for
4 example, is on page 24 of 66. But if you go to page 47, we
5 have some unredacted pages. Do you see that?

6 **A.** Yes.

7 **Q.** And this is the evaluating factors PowerPoint that
8 relates to that first agenda item, second subpoint,
9 evaluating factors in admission?

10 **A.** Yes.

11 **Q.** And these are familiar slides, correct? We were looking
12 at these yesterday in Plaintiff's Exhibit 12?

13 **A.** Yes.

14 **Q.** And the third subpoint under that first bullet says,
15 "Low-income admissions memo on the agenda."

16 You attached slides for that as well, correct?

17 If you go to page 59, that might help you.

18 **A.** Thank you. Yes.

19 **Q.** And here, page 59, you've attached the same May 1 memo
20 that we looked at yesterday, Plaintiff's Exhibit 26, that you
21 had previously prepared for Dean Fitzsimmons, right?

22 **A.** Yes.

23 **Q.** And that was what was meant by that third sub-bullet
24 point, low-income admissions memo?

25 **A.** Yes.

1 **Q.** Now, you don't recall Dean Khurana at your meeting on
2 July 11th criticizing the analyses that you had sent to him,
3 do you?

4 **A.** My memory of that meeting does not discuss any specific
5 discussion of our work.

6 **Q.** And so you don't have any specific discussion of or you
7 don't have any specific recollection of a discussion with
8 Dean Khurana where he criticized either of the analyses that
9 were P12 and P26 that you had sent to him, correct?

10 **A.** No. My memory of that meeting is that he shared sort of
11 his vision admission for the college and what he was planning
12 to do as dean. And I don't remember discussing any of the
13 work we had shared with him that day.

14 **Q.** And if you go back to the agenda, the third bullet point,
15 as we noted, was discussion of OIR work and potential new
16 projects. You see that?

17 **A.** Yes.

18 **Q.** And you don't recall there being any discussion with Dean
19 Khurana at this July 2014 meeting about any new OIR project
20 to further investigate a possible Asian penalty in
21 admissions?

22 MS. ELLSWORTH: I'm going to object on foundation
23 for that question. I don't think it's been established.

24 MR. McBRIDE: It was a "you don't recall" question.

25 THE COURT: It's overruled.

1 THE WITNESS: Can you repeat the question?

2 BY MR. McBRIDE:

3 Q. Sure. You don't recall there being any discussion with
4 Dean Khurana at this July 2014 meeting about a new OIR
5 project to further investigate a possible Asian penalty in
6 the admissions at Harvard?

7 A. No. Again, my memory of that meeting is we discussed
8 Dean Khurana's vision for his role at the college.

9 Q. And you don't recall anyone taking any action with
10 respect to these reports after this meeting in July of 2014?

11 A. I don't remember any subsequent discussion of these
12 analyses, no.

13 Q. Or any subsequent action with respect to them?

14 A. I don't remember any subsequent work, no.

15 Q. Now, we can agree that OIR did some logistic regression
16 models of the Harvard admissions starting in at least
17 February of 2013 that we have reviewed, right?

18 A. Yes. They did a limited analysis with a limited number
19 of variables, yes.

20 Q. And you forwarded those to your co-workers in Boston OIR
21 in February of 2013. We saw that?

22 A. We did.

23 Q. And you sent a memo to Dean Fitzsimmons using those
24 models in May of 2013. We saw that?

25 A. We saw similar models and a new memo, yes.

1 **Q.** And we also saw you sent additionally updated versions to
2 Dean Fitzsimmons in June of 2013?

3 **A.** Yes.

4 **Q.** And you collected them and sent them again to your boss,
5 Erin Driver-Linn, in October of 2013 just before the
6 scheduled meeting with respect to the *Fisher* case?

7 **A.** Yes.

8 **Q.** And ultimately you passed them along to the new Dean
9 Khurana in July of 2014 as part of orienting him to the OIR's
10 work?

11 **A.** Yes. It was part of a series of, you know, analyses we
12 shared with him. I think we shared over 300 pages of our
13 work with Dean Khurana when he started as dean.

14 **Q.** None of these times when you collected and drafted and
15 forwarded these models did you tell the recipients that the
16 models you were sending were incomplete or unreliable, did
17 you?

18 **A.** No.

19 **Q.** And you never told them anything other -- you never said
20 anything -- there was anything other than the accurate,
21 timely and digestible research that was your standard at OIR,
22 did you?

23 **A.** Yes. Although we often shared the limitations that we
24 knew of of our work.

25 **Q.** And you don't have any specific recollection here of

1 having shared those limitations because you don't recall the
2 discussions and meetings in question?

3 **A.** Well, we looked at some of the memos which lists the
4 limitations of our work.

5 **Q.** Correct. We looked at that in P26, right. But
6 otherwise, you never told them this was anything other than
7 the accurate, timely, and digestible research that was your
8 standard at OIR. Is that right?

9 **A.** At the time of those communications we reviewed, that's
10 correct, yes.

11 MR. McBRIDE: No further questions, Your Honor.

12 EXAMINATION

13 BY MS. ELLSWORTH:

14 **Q.** Good morning, Ms. Bever.

15 **A.** Good morning.

16 **Q.** Ms. Bever, do you recall discussing your analysis in
17 Exhibit P12 with Mr. McBride yesterday?

18 **A.** Yes.

19 **Q.** And specifically the pages of that analysis that relate
20 to evaluating factors in Harvard College admissions?

21 **A.** Yes.

22 **Q.** You recall discussing the analysis in P26 relating to
23 low-income students and Harvard College admissions with
24 Mr. McBride?

25 **A.** Yes.

1 **Q.** Mr. McBride characterized that analysis as an analysis
2 about the extent to which the admissions process fell
3 negatively on Asian-Americans. Do you recall that?

4 **A.** I do.

5 THE COURT: Can you bend that microphone down a
6 little bit more.

7 MS. ELLSWORTH: Sure can. Is that better?

8 THE COURT: Yes, thank you.

9 BY MS. ELLSWORTH:

10 **Q.** Do you agree with that characterization?

11 MR. McBRIDE: Objection, Your Honor. Can we have a
12 sidebar, please?

13 THE COURT: Yes.

14 [Sidebar sealed and redacted.]

15 BY MS. ELLSWORTH:

16 **Q.** I believe my question to you, Ms. Bever, was relating to
17 Mr. McBride's characterizations of the two exhibits
18 yesterday, P12 and P26.

19 Do you have that in mind?

20 **A.** Yes.

21 **Q.** Mr. McBride characterized the analysis in P12 as an
22 analysis about the extent to which the admissions process
23 fell negatively on Asian-Americans. Do you recall that?

24 **A.** Yes.

25 **Q.** Do you agree with that characterization?

1 **A.** No. I would say the analysis shows the relationship
2 between a number of variables and their correlation with the
3 outcome of interest.

4 **Q.** Was Mr. McBride's characterization of the work in P12 an
5 accurate characterization of the work that you did while you
6 were in OIR?

7 **A.** I would not agree that it's an accurate characterization.

8 **Q.** Could you speak up a little bit, please?

9 **A.** I would not agree that it's an accurate characterization.

10 **Q.** Thank you.

11 Mr. McBride also characterized the analysis as an
12 analysis that answers questions about the effect of Harvard's
13 use of race in admissions. Do you recall that testimony
14 yesterday?

15 **A.** I do recall that.

16 **Q.** Do you agree with that characterization by Mr. McBride?

17 **A.** No. I would say the analysis that was done is missing a
18 number of the factors and cannot capture the process we use
19 in admissions, and so it's not doing that.

20 **Q.** And Mr. McBride also this morning characterized the OIR
21 work that was shared with Dean Khurana as showing an Asian
22 penalty. Do you recall that characterization?

23 **A.** I do.

24 **Q.** Do you agree with that characterization?

25 **A.** I do not.

1 **Q.** Is it an accurate characterization?

2 **A.** No.

3 **Q.** Ms. Bever, how long did you work at OIR?

4 **A.** Seven years.

5 **Q.** And during your seven years at OIR, how many of your
6 colleagues had experience working in the Harvard College
7 admissions office?

8 **A.** None of us did.

9 **Q.** And how many of your colleagues from OIR in the seven
10 years that you worked there had worked in any college
11 admissions office?

12 **A.** I don't think any of us had ever worked in admissions.

13 **Q.** Would you look, please, at Tab 1 in your binder that was
14 just provided to you by Harvard, which is Exhibit P12.

15 **A.** Yes. Just give me a moment. You said Tab 1?

16 **Q.** Yes. Do you have P12 in front of you?

17 **A.** I do.

18 **Q.** All right. Have you had a chance to review the analysis
19 in P12 in connection with this litigation?

20 **A.** Yes.

21 **Q.** Can you turn to Slide 33, please.

22 **A.** Okay.

23 **Q.** What does Slide 33 of Exhibit P12 show?

24 **A.** It shows of the specifications for four models.

25 **Q.** In the four models on Slide 33, which model includes the

1 most variables?

2 **A.** Model 4.

3 **Q.** And how many variables are included in Model 4?

4 **A.** Eight.

5 **Q.** Now, how long have you worked in the Harvard College
6 admissions office, Ms. Bever?

7 **A.** Four years.

8 **Q.** And in that time, have you -- you've participated in
9 three separate admission cycles, right?

10 **A.** That's correct.

11 **Q.** Approximately how many application files have you been
12 the first reader on?

13 **A.** Over 2,000.

14 **Q.** And approximately how many admissions files or -- and
15 applicants for admission have you discussed in subcommittee?

16 **A.** I could not count.

17 **Q.** Is it more than the files you've read?

18 **A.** Yes.

19 **Q.** More than a thousand?

20 **A.** Certainly more than a thousand.

21 **Q.** More than 2,000?

22 **A.** Certainly more than 2,000.

23 **Q.** How many application files have you discussed in the full
24 committee process in your three years in the Harvard College
25 admissions office?

1 **A.** I could not count.

2 **Q.** More than 2,000?

3 **A.** Certainly more than 2,000.

4 **Q.** Okay. Since your time in admissions, have you come to
5 learn about the factors that are important to Harvard College
6 in assessing an applicant for admission?

7 **A.** Yes.

8 **Q.** And having the benefit of having worked in the admissions
9 office, are the factors that are important to evaluating
10 Harvard College admission reflected on page 33?

11 MR. McBRIDE: Objection, Your Honor. We're well
12 into leading territory now.

13 MS. ELLSWORTH: I'll withdraw and retry.

14 MR. McBRIDE: Also, Your Honor, again we are
15 eliciting undisclosed opinion testimony.

16 THE COURT: Well, it's not undisclosed opinion
17 testimony. She's agreed to rephrase the question, so . . .

18 BY MS. ELLSWORTH:

19 **Q.** Based on your experience in admissions, how many factors
20 does the admissions office consider in evaluating an
21 applicant?

22 **A.** Hundreds. And lots of narrative text that can't be
23 captured in qualitative variables.

24 **Q.** And how do those hundreds of factors compare to the
25 variables listed on Slide 33 of Exhibit P12?

1 **A.** Certainly this is a very small subset of the things we
2 review when we review applicants.

3 **Q.** What's an example of some factors that are admitted and
4 not listed on Slide 33 of Exhibit P12?

5 **A.** There are a number of ratings we provide during our
6 process that are not captured here, such as ratings of the
7 school support, alumni interviews, staff interviews, music
8 evaluations, faculty evaluations, and things like that.

9 **Q.** Are all of the factors that are considered by Harvard
10 College in admissions decisions quantified in data?

11 **A.** No, not all of them are.

12 **Q.** What are some examples of factors considered in Harvard
13 College admissions that are not quantified in data?

14 **A.** So the personal essay comes to mind. Often faculty
15 provide feedback that is not quantified. The narrative piece
16 that is described in letters and things like that is rated
17 but not always quantifiable.

18 **Q.** Are all of those factors you just listed important to the
19 admissions process?

20 **A.** Very important.

21 **Q.** Let's take a look at Slide 36 of P12, please. What is --
22 what does Slide 36 show?

23 **A.** Slide 36 shows -- it says what we have learned, and it
24 sort of describes what they have done and also what is
25 missing and what's not captured.

1 **Q.** Did OIR list factors not included in the models in
2 Exhibit P12 on Slide 36?

3 **A.** They did.

4 **Q.** What factors are listed?

5 **A.** Exceptional talent, parentheses, music, art, writing, the
6 role of context cases, the role of the personal statement
7 essay, measures of socioeconomic status such as HFAI flag,
8 low-income flag.

9 **Q.** Knowing what you now know from your time in admissions,
10 are those factors important?

11 **A.** Very, yes.

12 **Q.** When you review an application to Harvard College, what's
13 the goal of your review of that file?

14 **A.** To assess the overall strength of that particular
15 applicant and their likelihood of admission in comparison
16 with others.

17 **Q.** And what are some of the examples of the types of forms
18 of strength an application could exhibit?

19 **A.** Some of the things listed here, such as exceptional
20 talent or a passion for a particular type of community
21 service. It can be athletic strength. It can be overcoming
22 challenges and background. It can be a variety of things.

23 **Q.** And how does your assessment of those various forms of
24 strengths you just listed compare to the OIR model shown in
25 Exhibit P12?

1 **A.** Some of those things are very difficult to capture in
2 data, and so they're just not included in that. It would be
3 difficult to include them in a model.

4 **Q.** Do you understand that Harvard has retained an economist
5 named David Card to conduct an analysis of Harvard's
6 admissions data in this litigation?

7 **A.** Yes.

8 **Q.** And you understand he created a model of the Harvard
9 admissions process?

10 **A.** Yes.

11 **Q.** Have you seen the list of factors included in Dr. Card's
12 model?

13 **A.** I have.

14 **Q.** Between OIR's model in P12 and Dr. Card's model, which
15 model captures more of the information you use in the
16 admissions office in making decisions?

17 **A.** I believe Dr. Card's model has many more factors
18 included.

19 **Q.** Have you seen any OIR analysis that models as many
20 factors in the admissions process as Dr. Card modeled?

21 **A.** I have not.

22 **Q.** Let's turn back to your background for a minute,
23 Ms. Bever.

24 Could you tell us a bit about your education,
25 beginning with college?

1 **A.** I was educated at Wellesley College.

2 **Q.** Do you have any degrees after --

3 THE COURT: Can I interrupt for a second?

4 You say Model 4 sort of is very incomplete. But it
5 still really closely approximates the actual, right?

6 THE WITNESS: So it approximates, if I recall, the
7 demographics but not the actual students that would have been
8 selected for admission. So we don't know who those students
9 are in that final bar.

10 BY MS. ELLSWORTH:

11 **Q.** And I think if we look at Slide 34, is that the bar graph
12 that you're referring to?

13 **A.** Yes.

14 THE WITNESS: Is that what you mean?

15 THE COURT: It is what I mean, but --

16 THE WITNESS: So we don't know that the students
17 that are selected in this bar are the actual students who
18 were selected for admission, if that makes sense.

19 THE COURT: I guess you're saying that Model 4 is
20 incomplete. But it seems like whatever variables you did
21 include were good markers because they so closely reflected
22 actual.

23 THE WITNESS: They so closely reflect the
24 demographic breakdown but not who was actually selected
25 for -- I don't know who was actually selected for admission

1 and how closely aligned those two things are.

2 THE COURT: Okay.

3 BY MS. ELLSWORTH:

4 Q. Ms. Bever, I'm sorry. I believe my question was, after
5 Wellesley did you have any additional education?

6 A. Yes. I have a master's degree in education.

7 Q. When did you start working at Harvard?

8 A. In July of 2007.

9 Q. Why did you decide to work at Harvard?

10 A. I was interested in the work of institutional research,
11 and there was a one-year fellowship position that I felt
12 would give me a good introduction to Harvard. I have some
13 family connections to Harvard, so I was in interested in
14 working there as well.

15 Q. By "family connections," what are you referring to?

16 A. My grandfather attended Harvard College. He was the same
17 class as John F. Kennedy.

18 Q. You had fond memories of Harvard from growing up?

19 A. Harvard changed his life and I heard a lot about it as a
20 child. No one else in my family went to Harvard, but it had
21 been very important to him.

22 Q. And when you joined that fellowship program, that was in
23 the office of institutional research, right?

24 A. It was.

25 Q. How many -- withdrawn.

1 What positions have you held over your 11 years at
2 Harvard?

3 **A.** So I began as a management fellow and then I served as a
4 research analyst and an assistant director in the office of
5 institutional research before joining the office of
6 admissions in my current role.

7 **Q.** And what is your current role and title?

8 **A.** I'm the director of research for Harvard College
9 admissions and financial aid.

10 **Q.** And are you also a senior admissions officer?

11 **A.** I am a senior admissions officer, yes.

12 **Q.** You told Mr. McBride that you read 500 files in an
13 admission cycle. Is that right?

14 **A.** About that, yes.

15 **Q.** Is that a lower number than other senior admissions
16 officers read?

17 **A.** Yes. I have about a quarter load of admissions files.

18 **Q.** And why do you have a quarter load of admissions files?

19 **A.** Because of the other duties I have in the office.

20 **Q.** Remind me, please, when did you join the admissions
21 office?

22 **A.** I joined the office in August of 2014.

23 **Q.** And you're a member of the 40-person admissions
24 committee?

25 **A.** I am.

1 **Q.** So you have experience both in OIR and in the admissions
2 office, correct?

3 **A.** Yes.

4 **Q.** And do you still conduct research in the admissions
5 office relating to Harvard College admissions data?

6 **A.** I do.

7 **Q.** I'd like to ask you to turn to Tab 3, please, which is
8 Exhibit P17. This is a document Mr. McBride didn't show you.
9 Do you have it in front of you?

10 **A.** I do.

11 **Q.** Do you recognize P17?

12 **A.** Yes.

13 **Q.** What is this document?

14 **A.** It is an email from my former colleague Mark Hansen to
15 Elizabeth Yong. The subject is "Admissions data."

16 MS. ELLSWORTH: Your Honor, I'd move the admission
17 of P17.

18 MR. McBRIDE: No objection, Your Honor.

19 THE COURT: Admitted.

20 (Plaintiff Exhibit No. P17 admitted.)

21 BY MS. ELLSWORTH:

22 **Q.** What is the date of the email in P17?

23 **A.** It's Tuesday, February 26, 2013.

24 **Q.** Can you please read the first sentence of the email in
25 P17?

1 **A.** It says, "Hello, Elizabeth. Thank you for coming over
2 and meeting with us yesterday."

3 **Q.** Can you please read the sentence -- withdrawn, actually.
4 Who is Ms. Yong?

5 **A.** I'm not sure what Ms. Yong's title was when she was in
6 admissions, but she was the person in admissions we would
7 contact about admissions data.

8 **Q.** And Mr. Hansen worked for you at this time?

9 **A.** Yes.

10 **Q.** Can you please read the sentence beginning with "I've
11 attached."

12 **A.** Where are you? Thank you.

13 "I've attached the most recent file specification
14 so that you can see the most complete set of variables we
15 have."

16 **Q.** And does Exhibit P17 have an attachment?

17 **A.** It does.

18 **Q.** And can you please turn to the attachment. It's a little
19 hard to read so Mr. Lee has blown it up on the screen for you
20 there.

21 What does the attachment contain?

22 **A.** It contains a list of -- looks like data from admissions
23 that includes demographics and family background, a lot of
24 SAT scores, some of the main ratings we use.

25 **Q.** And are the factors listed in P17 the data that were

1 available to OIR in 2013?

2 **A.** Based on this email, it appears so, yes.

3 **Q.** Is the -- does the exhibit -- the attachment to
4 Exhibit P17 contain a comprehensive list of the factors
5 important to admissions decisions?

6 **A.** No, it does not.

7 **Q.** Can you turn back, please, to the first page of P17, to
8 the email. Please read the sentence at the bottom of the
9 first paragraph that begins "In addition to."

10 **A.** "In addition to the variables we have in the file
11 specification, we'd like to request the following variables
12 if they exist: One, disadvantaged flag; two, HFAI search
13 flag; three, faculty staff flag; four, docket; five, some
14 kind of reader ID; six, veteran status; seven, language
15 spoken at home."

16 **Q.** What does this portion of the email in P17 tell you about
17 the data sources to which OIR had access in 2013?

18 **A.** They were limited, and they were aware that they were
19 incomplete.

20 **Q.** And when you say they were aware, do you mean OIR?

21 **A.** Oh, yes.

22 **Q.** Do the factors that are listed or requested by Mr. Hansen
23 from Ms. Yong in P17 play a role in the admissions process?

24 **A.** They can, yes.

25 **Q.** Are the missing factors listed in P17 important to the

1 actual admissions process?

2 MR. McBRIDE: Your Honor, I object. We're getting
3 well into leading territory again.

4 THE COURT: I don't think that's a leading
5 question. It's overruled.

6 THE WITNESS: Sorry. Could you repeat the
7 question?

8 BY MS. ELLSWORTH:

9 Q. Are the missing factors important to the actual
10 admissions process?

11 A. Yes.

12 Q. Can you please read the sentence after the list of seven
13 factors OIR was requesting, beginning "If you can think"?

14 A. "If you can think of any other variables that are
15 important in making admissions decisions, please let me
16 know."

17 Q. What does this Exhibit P17 tell you about OIR's
18 understanding of the Harvard College admissions process in
19 February 2013?

20 A. So it seems that they were aware -- OIR was aware that
21 there were variables that were missing and that they still
22 didn't know all the things that admissions might be using in
23 the process.

24 Q. Is there a difference between admissions data and the
25 admissions process?

1 **A.** Yes.

2 **Q.** What's the difference?

3 **A.** The data reflects those things that can be quantified.
4 But it is difficult to capture the amount of time and
5 additional information that comes in throughout the process,
6 the committee procedures, the subcommittee meetings, full
7 committee meetings in which applications are discussed.

8 **Q.** Is there information that is important in making
9 admissions decisions beyond what OIR had that we've reviewed
10 in these exhibits?

11 **A.** Is there -- yes.

12 **Q.** And based on the four years that you've been an
13 admissions officer, could you make an admissions decision as
14 to a particular applicant if you had only the information
15 listed in Exhibit P17?

16 **A.** No, nor would I want to.

17 **Q.** You recall speaking with Mr. McBride about the May 1st,
18 2013, memo that's Exhibit P26 relating to low-income
19 admissions?

20 **A.** Yes.

21 **Q.** You can take a look at it in your binder. P26. It might
22 be in Mr. McBride's binder.

23 **A.** Okay.

24 **Q.** I think it's Tab 4 in the binder we gave you.

25 **A.** Where should I look?

1 **Q.** Tab 4 in our binder. Sorry.

2 Are you there at P26?

3 **A.** Yes. Sorry.

4 **Q.** In this memorandum that was sent to Dean Fitzsimmons, did
5 OIR tell Dean Fitzsimmons that the analysis showed
6 discrimination against Asian-Americans?

7 **A.** It did not.

8 **Q.** Did the memorandum tell Dean Fitzsimmons that the data
9 showed bias against Asian-Americans?

10 **A.** No.

11 **Q.** Why did OIR draft the May 1st, 2013, memorandum?

12 **A.** My recollection is that Dean Fitzsimmons left a voicemail
13 for either Erin or myself in which he asked us to look at
14 whether or not there was a low-income tip for -- in the
15 admissions process.

16 **Q.** And did you recall that voicemail at the time you were
17 deposed in this case?

18 **A.** No. I remembered it after the fact.

19 **Q.** What was OIR's conclusion in response to Dean
20 Fitzsimmons' question?

21 **A.** That we could see a tip for low-income students in the
22 admissions process.

23 **Q.** Let's take a look at the third page of P26, which is the
24 second page of the memo. 23549 is the Bates. It's also in
25 front of you on the screen.

1 **A.** Yes.

2 **Q.** Can you please read the second paragraph starting with
3 "We implement"?

4 **A.** Where are you? Sorry. Okay.

5 "We implement a logistic regression model to
6 predict the probability of admission, controlling for
7 demographic characteristics and a variety of metrics used to
8 assess qualification for admission. Demographic
9 characteristics include gender and race ethnicity.
10 Qualifications used in admission include academic index,
11 academic rating, extracurricular rating, personal rating,
12 athletic rating, and legacy status."

13 **Q.** Are the qualifications used in admissions that you just
14 read from P26 the same factors included in that February 2013
15 analysis that's in Exhibit P12?

16 **A.** I think so, yes.

17 **Q.** And does that list include all factors important to the
18 admissions process?

19 **A.** No.

20 **Q.** Are the factors listed in this paragraph in Exhibit P26
21 the only qualifications used in Harvard College admissions?

22 **A.** No. There are many others.

23 THE COURT: I should have asked this of the dean
24 yesterday, but I didn't think of it until last night. So
25 here you are.

1 THE WITNESS: Okay. Can I be dean for a day?

2 THE COURT: So I take from this that you can have a
3 tip that's like a conscious tip, like, you know, economic
4 status or whatever. And then you can have something that
5 turns out to be a tip but you don't realize it's a tip until
6 after you look at the data.

7 THE WITNESS: You mean after we read the
8 application?

9 THE COURT: No. After you do a regression
10 analysis -- like he's asking -- he asked initially if there's
11 a tip for low income.

12 THE WITNESS: Yeah.

13 THE COURT: So is he trying to verify that you are
14 having the tip that he wants for low income, or is he trying
15 to figure out that there's a tip at all?

16 THE WITNESS: So we had talked about this a lot,
17 sort of the low income, right.

18 He was asking whether the data would show that we
19 do -- his statement was: We do give a tip for low-income
20 students in our process. Can we show that? Right?

21 It's hard to describe. That's why we're here.
22 It's hard to describe, right, how the process works. So we
23 wanted to be able to point to something to say, look, I'm
24 giving a tip for low-income students. But I think he was
25 aware that that's what the process was doing. And again, you

1 need to be in the discussion to get a tip, right?

2 THE COURT: Well, are there times when you don't
3 realize that you're tipping for something or like
4 anti-tipping for something and then you go to the data and it
5 shows that there actually is a tip that you didn't really
6 intend or know about?

7 THE WITNESS: That's a good -- I have never looked
8 at that. I don't know if that's true. Again, what we're
9 trying to do in our admissions process is assess the
10 strength, and sometimes the fact that a student comes from a
11 disadvantaged background and we can see that in their
12 application will make that case stronger than a student who
13 appears similarly situated but, say, didn't overcome that.
14 And so that's how that would play out in the actual process.
15 And maybe for that student, if we looked at the data, it
16 would show the strong correlation between their low-income
17 status and being admitted.

18 THE COURT: Okay. Sorry.

19 MS. ELLSWORTH: That's fine, Your Honor.

20 BY MS. ELLSWORTH:

21 **Q.** Ms. Bever, just following up on the Court's question, do
22 you all do data analysis in the admissions office to try and
23 see whether you're giving tips?

24 **A.** No. Not outside of this litigation.

25 **Q.** Do you -- when you're considering an applicant for

1 admission, do you think about how that's going to end up
2 looking reflected in the data after the fact?

3 **A.** No.

4 **Q.** What are you trying to do when you consider an applicant
5 for admission?

6 **A.** We're trying to admit a student who will use Harvard well
7 and benefit from Harvard and find the best class we can.

8 **Q.** Looking back at this P26 that we have in front of you,
9 the factors that are listed here that you read off, are those
10 the same factors that were included in Dr. Card's model that
11 you reviewed?

12 **A.** These factors at the bottom of this paragraph?

13 **Q.** Yes.

14 **A.** I believe he includes these factors. But of course there
15 are many others in his model.

16 **Q.** Dr. Card's model includes many more factors than this OIR
17 analysis in P26?

18 **A.** Yes.

19 **Q.** And were any of the three OIR individuals working on P26
20 Ph.D. economists?

21 **A.** No.

22 **Q.** Between OIR's model and P26 and Dr. Card's, which model
23 captures more of the information used in making admissions
24 decisions at Harvard College?

25 **A.** I believe Dr. Card's model includes more.

1 **Q.** And you looked at the listing of factors that are
2 included in his model, right?

3 **A.** I have.

4 **Q.** If you can, look, please, at the next paragraph down on
5 P26, beginning with "This approach," and if you could read
6 the first two sentences.

7 **A.** "This approach has several limitations. We picked a
8 small set of variables that would factor in admissions
9 decisions. The selection of a wider set of variables might
10 result in a better fitting model, one that accounts for more
11 of the variation in individual applicants and their
12 potentially unique contributions to the entering class."

13 **Q.** Is that true?

14 **A.** I believe so, yes.

15 **Q.** Mr. McBride asked you several questions about whether the
16 work of OIR he showed you was complete and reliable. Do you
17 remember that testimony?

18 **A.** Yes.

19 **Q.** And you agree that OIR tried to do complete and reliable
20 work, right?

21 **A.** I believe we did, yes.

22 **Q.** Can work be complete and reliable and still be
23 preliminary?

24 **A.** Yes.

25 **Q.** Can work be complete and reliable and still be limited?

1 **A.** Yes.

2 **Q.** Let's look at the last sentence of the same paragraph,
3 beginning "In addition." Could you please read that.

4 **A.** "In addition, our model is limited to the main effects,
5 not examining interactions between variables. Our analysis
6 should not be considered exhaustive."

7 **Q.** Is that true?

8 **A.** Yes.

9 **Q.** The prior sentences that you were reading noted that the
10 model contained a small set of variables. Do you see that
11 above?

12 **A.** Yes.

13 **Q.** And you've had a chance to review the chart that's in
14 Exhibit P26 on the next page?

15 **A.** Yes.

16 **Q.** Do you agree with the statement in the OIR memo that this
17 model uses a small set of variables?

18 **A.** It does.

19 **Q.** Why did OIR include a description of the limitations of
20 the analysis in this memorandum?

21 **A.** I think it's fairly standard practice in doing this sort
22 of work where you would acknowledge the things that cannot be
23 measured in a model or that you don't have data for.

24 **Q.** Do you recall yesterday just before we broke Mr. McBride
25 asking you questions about some earlier drafts of this

1 memorandum?

2 **A.** I do.

3 **Q.** He asked about some sentences that were edited in the
4 final version?

5 **A.** Yes.

6 **Q.** Did the drafts that you looked at yesterday, Exhibits P26
7 and P25, did those ever go to Dean Fitzsimmons?

8 **A.** I don't think they did.

9 **Q.** Did OIR conduct any follow-up analysis after P26 was sent
10 to him on May 1st, 2013?

11 **A.** I believe we did, yes.

12 **Q.** And what follow-up analysis did OIR conduct?

13 **A.** I think Dean Fitzsimmons asked us to look at the
14 interaction between race, ethnicity, and low-income status.

15 **Q.** Did that follow-up analysis include all the factors that
16 the actual admissions process involves?

17 **A.** It did not.

18 **Q.** Was that another example of OIR doing reliable work that
19 might still be limited?

20 **A.** Yes.

21 **Q.** And again, Ms. Bever, have you seen any OIR study that
22 models all factors in the admissions process?

23 **A.** No.

24 **Q.** Mr. McBride asked you this morning about the meeting you
25 had with Dean Khurana in July of 2014. Do you remember that?

1 **A.** I do.

2 **Q.** And you referenced that you believed you had sent over
3 300 pages of work to Dean Khurana when he first became dean.
4 Do you recall that?

5 **A.** I do.

6 **Q.** Could you turn to Tab 9, please, which is Exhibit P288.

7 **A.** Yes.

8 **Q.** Do you recognize P288?

9 **A.** I do.

10 **Q.** What is P288?

11 **A.** P288 is a cover memo that accompanied our -- the actually
12 fairly exhaustive set of work we shared with Dean Khurana
13 when he became dean.

14 **Q.** And the date of the memo is?

15 **A.** May 30, 2014.

16 **Q.** It is from Ms. Driver-Linn, correct?

17 **A.** It is.

18 **Q.** Were you involved in drafting this memo?

19 **A.** I think so.

20 **Q.** Were you involved in compiling the exhibits that
21 accompanied this memo?

22 **A.** I think so, yes.

23 MS. ELLSWORTH: Your Honor, I move to admit P288.

24 MR. McBRIDE: No objection Your Honor.

25 THE COURT: It's admitted.

1 (Plaintiff Exhibit No. P288 admitted.)

2 BY MS. ELLSWORTH:

3 **Q.** Can you just describe at a general level -- it's a large
4 exhibit -- what was included in the documents sent to Dean
5 Khurana in December of 2014?

6 **A.** I think we were aiming for completeness, and we tried to
7 include as many examples of our work as we could.

8 **Q.** Was all of OIR's work relating to Harvard College
9 attached to the memo?

10 **A.** I can't say for certain that it was all, but it was
11 certainly most.

12 **Q.** And you recall discussing with Mr. McBride this morning a
13 few additional analyses that were sent closer in time to
14 another meeting, right?

15 **A.** Yes.

16 **Q.** Did you -- withdrawn.

17 Why did you meet with Dean Khurana in July 2014?

18 **A.** My recollection of that meeting is that the purpose was
19 to introduce him to our office and for us to be able to meet
20 him.

21 **Q.** And you testified in response to Mr. McBride's questions
22 that you don't recall discussing with Dean Khurana any
23 specific analyses, right?

24 **A.** I don't recall discussing our work with him in any
25 detail.

1 **Q.** You do recall the meeting with Dean Khurana, right?

2 **A.** I do.

3 **Q.** And your memory is there was no discussion of the
4 substantive work provided by OIR?

5 **A.** That's correct.

6 **Q.** Was the purpose of the July 2014 meeting to show Dean
7 Khurana OIR's current works in progress?

8 **A.** I don't think so, no.

9 **Q.** Were you seeking Dean Khurana's input on any of the
10 analyses you showed him?

11 **A.** No.

12 **Q.** Were you seeking his reaction to any of the analysis you
13 showed him?

14 **A.** I don't think we showed him anything, and I don't think
15 we were asking for feedback.

16 **Q.** Are there -- is there more than one institutional
17 research office in Harvard University?

18 **A.** There is.

19 **Q.** Is there an institutional research department for Harvard
20 College as well?

21 **A.** Yes.

22 **Q.** And Dean Khurana is the dean of Harvard College, right?

23 **A.** Yes.

24 **Q.** The institutional research for Harvard College is
25 different than OIR, right?

1 **A.** That's correct.

2 **Q.** And is the difference between college research and the
3 office of institutional research some of what you were trying
4 to discuss with Dean Khurana in July 2014?

5 **A.** It may have been. I don't specifically recall.

6 **Q.** Were you trying to alert Dean Khurana to any findings of
7 discrimination in sending him any of the material that you
8 did?

9 **A.** I don't believe so.

10 **Q.** Were you trying to alert Dean Khurana to any findings of
11 bias in sending him the information?

12 **A.** No.

13 **Q.** Let's switch gears and talk a little bit about your work
14 in the admissions office. Okay?

15 **A.** Okay.

16 **Q.** Why did you want to move from OIR to admissions?

17 **A.** The work I had done on the affordability initiative at
18 Harvard and the return to early action was some of the work I
19 most enjoyed. So when I saw the job posting for the director
20 of research role, I decided I would like to try that.

21 **Q.** And do you enjoy your work in admissions?

22 **A.** I love my job.

23 **Q.** You recall Mr. McBride asking you a little bit about
24 training that you received when you joined the office?

25 **A.** Yes.

1 **Q.** Can you describe the form of the training that you had
2 when you first joined admissions?

3 **A.** I had a month-long orientation period where I met with
4 colleagues from across the office of admissions and financial
5 aid.

6 **Q.** And who conducted the training, the orientation?

7 **A.** Yeah. I think it was Grace Cheng who organized the
8 training and conducted some of the sessions. But I met with
9 colleagues from -- many colleagues from across the office who
10 performed different roles and work on different parts of our
11 process.

12 **Q.** What types of information did you learn in your
13 admissions orientation?

14 **A.** So everything from how our recruiting groups function to,
15 you know, how we read an application, to our yield
16 activities, to the subcommittee process, and things like
17 that.

18 **Q.** And what specific training did you receive relating to
19 reading and reviewing application files?

20 **A.** So we had a specific training where we were given some of
21 our case book files to read and review after going through
22 what's called the reading procedures that describes how to
23 read a file and talking about how we do that initial
24 assessment.

25 And then we did a mock committee where we presented

1 cases and discussed them as if we were actually in the
2 admissions process.

3 **Q.** And why does the admissions office conduct its training
4 in the manner you just described?

5 **A.** I think part of what we do is best learned by actually
6 doing it, actually reading an application file, seeing all
7 the pieces of information there are, trying to make an
8 initial assessment, using the ratings, and then figuring out
9 how you're going to share that information with your
10 colleagues and committee.

11 **Q.** And you discussed with Mr. McBride a little bit the fact
12 that somebody read your initial files after you when you were
13 new in the admissions office. Do you remember that?

14 **A.** Yes.

15 **Q.** What type of feedback did you receive from those second
16 reviewers?

17 **A.** The second reviewers provide ratings of their own and
18 then often write up a narrative themselves of what they see
19 the particular strengths of that application are, any missing
20 pieces of information, whether they -- you know, some of them
21 might have agreed, just said I agree with everything you've
22 said here. Some of them would have said, you know, we're
23 going to need the following pieces of information before we
24 might bring this further.

25 So it's written feedback mostly that helps me, as

1 the newer reader, understand how other colleagues might see
2 that file.

3 **Q.** And did you take that feedback into account when
4 reviewing additional files after you received the feedback?

5 **A.** Yes.

6 **Q.** How so?

7 **A.** Again, I think I went through every single file and read
8 how my colleagues either saw me, my own read. And it helped
9 refine what I was doing, how I was -- refined what I wrote on
10 the application, and helped me think about what's going to
11 make a strong applicant.

12 **Q.** Since that initial training that you've just described,
13 have you received additional on-the-job training?

14 **A.** Yes. We have ongoing sessions and things like that.

15 **Q.** Have you received any training relating to the Supreme
16 Court's guidance on the use of race in college admissions?

17 **A.** We have.

18 **Q.** Who conducted those trainings?

19 **A.** Our general counsel, Bob Iuliano.

20 **Q.** How frequently do those trainings occur?

21 **A.** Annually.

22 **Q.** Without getting in the substance, what were topics of
23 Mr. Iuliano's annual trainings in the years that you've been
24 in the office?

25 **A.** So they vary, but his discussion of considerations in the

1 admissions process.

2 **Q.** Does the admissions office conduct any professional
3 development activities for admissions officers?

4 **A.** It does.

5 **Q.** What are some examples?

6 **A.** So we often have professional development sessions where
7 we invite faculty or other senior leaders from the university
8 to come talk to us about things that are changing at Harvard.
9 Sometimes we have external speakers, people doing research
10 that's relevant to our work, things like that.

11 **Q.** Have you had any professional development sessions
12 related to how files are reviewed and rated?

13 **A.** Yes. At our annual retreats.

14 **Q.** And what is the -- what is an example of a professional
15 development session at your retreat relating to the topic of
16 reviewing and rating files?

17 **A.** So we've done some joint reading of files and discussion
18 of how we use the ratings. This past year we had a
19 discussion about how we used the top ratings and the idea
20 that perhaps we should be using the top ratings more than we
21 have been.

22 **Q.** And by the "top ratings," you mean the 1s?

23 **A.** The 1s, yes.

24 **Q.** In those professional development activities you just
25 described, what have you learned?

1 **A.** Again, I think some of them are just helpful to have the
2 discussion about how others see the ratings, how they use
3 them in the process, what they are trying to signal, and they
4 help inform my own reading of an application.

5 **Q.** Who participated in those professional development
6 activities you just described?

7 **A.** Generally it's all the staff in retreats.

8 **Q.** And that means all 40 admissions officers who sit on
9 committee?

10 **A.** Yeah, and more.

11 **Q.** Let's turn quickly to the subject of how race is used in
12 the process.

13 So as a senior admissions officer, you're the first
14 reader on approximately 500 applications, right?

15 **A.** Yes.

16 **Q.** Can an applicant's race make his or her case for
17 admission more compelling?

18 **A.** Again, it can be part of their case, yes.

19 **Q.** And it can be a part of their case that might make their
20 application more compelling?

21 **A.** Yes.

22 **Q.** Is race the only factor that might make an application
23 more compelling?

24 **A.** No. There are many factors that make for compelling
25 applications.

1 **Q.** What are some of the other factors that may make an
2 application more compelling for admission?

3 **A.** Everything from geography to socioeconomic status to
4 exceptional talent.

5 **Q.** When you're assigning ratings to an application file,
6 does race ever factor into an applicant's academic rating?

7 **A.** It does not.

8 **Q.** Does race ever factor into an applicant's extracurricular
9 rating?

10 **A.** Not per se.

11 **Q.** Does race ever factor into an applicant's personal
12 rating?

13 **A.** Not per se.

14 **Q.** When you say "not per se," what do you mean?

15 **A.** I mean not the fact that they are a particular race, but
16 certainly students might write about their background and
17 things like that that would inform my personal rating or what
18 I give in the personal rating.

19 **Q.** When a student writes about their background in a way
20 that informs the personal rating, it's not their racial
21 background that's informing the rating. Is that your
22 testimony?

23 **A.** That's my testimony.

24 **Q.** Have you ever assigned an applicant a lower rating
25 because of his or her race?

1 **A.** No.

2 **Q.** Have you -- withdrawn.

3 Can you please describe the preliminary overall
4 rating?

5 **A.** So we use -- I -- I should speak for me.

6 I use the preliminary overall rating to give my
7 assessment of how strong I think that particular applicant
8 is. So it's intended to capture the whole, if one can, in a
9 rating.

10 **Q.** And does the preliminary overall rating differ from the
11 four profile ratings?

12 **A.** Yes.

13 **Q.** How so?

14 **A.** Again, it's trying to capture all of the pieces and give
15 an overall assessment of how strong that applicant is.

16 **Q.** Does race ever factor into an applicant's preliminary
17 overall rating?

18 **A.** Insofar as their race plays a role in how strongly I
19 might view a case, then yes.

20 **Q.** Let's talk take a look, if we can, at an application
21 file.

22 MS. ELLSWORTH: Your Honor, I'd like to show an
23 application that we'll be moving into evidence under seal, so
24 I'd like to ask the gallery monitors to be turned off,
25 please.

1 THE COURT: That's fine.

2 BY MS. ELLSWORTH:

3 Q. Let's pull up SA1, please. That's at Tab 6 in your
4 binder. Do you have SA1 in front of you, Ms. Bever?

5 A. Yes.

6 Q. Do you recognize SA1?

7 A. I do.

8 Q. What is that?

9 A. It is an application file.

10 Q. How do you recognize this exhibit?

11 A. This is the summary sheet that appears at the beginning
12 of our application reader, which is an online tool we use to
13 read applications.

14 Q. And did you read this application file?

15 A. I did.

16 Q. Were you the first reader?

17 A. I was.

18 Q. Now, this applicant's name is not redacted, correct?

19 A. That's correct.

20 Q. And you're aware that that applicant is a current Harvard
21 student who will testify in this case?

22 A. I am.

23 Q. What is the name of this student?

24 THE COURT: Where does it show on here that you
25 were the first reader?

1 THE WITNESS: So there is certain information on
2 this particular page that is associated with where we are in
3 the process now, and there is certain information that's tied
4 to the applicant. So my initials actually aren't here. This
5 has been changed to reflect who currently reads this high
6 school. But I remember this applicant.

7 MS. ELLSWORTH: And if you look at SA1 0005, it may
8 have the correct reader information on it.

9 THE COURT: Because normally it would have your
10 initials. It would have your initials under that rating,
11 right, because you did it?

12 MS. ELLSWORTH: Sorry. It's not 5. 40 is where
13 the reader sheet is.

14 THE WITNESS: Yes. So you can see I was actually
15 the first rater who submitted the form. The way our slate --
16 our CRM works is that this is being generated at the moment.
17 So because somebody else covers this high school now, her
18 initials are reflected, even though the data show my ratings
19 which happened in the past.

20 BY MS. ELLSWORTH:

21 **Q.** And Ms. Bever, following up on Her Honor's question, are
22 there other aspects of the first page of this and other files
23 from the cycle that have incorrect information on them
24 because of the way they were pulled?

25 **A.** Yes.

1 **Q.** What are those? What are the portions of the summary
2 sheet that have inaccurate information because of the way
3 they were pulled?

4 **A.** So for example, it says "Harvard Class of 2022" at the
5 top of it, and then above that it says "2015, Regular
6 Action."

7 The regular action was when this student actually
8 applied, but it was pulled at the time at which we were
9 reviewing applications from the class of 2022. So that's why
10 it says "Harvard Class of 2022."

11 **Q.** Other than -- the reader initials are incorrect on the
12 first page of the summary sheets for some these files,
13 correct?

14 **A.** Yes.

15 **Q.** They're correct on the reader rating sheet at the back?

16 **A.** Yes. The first reader rating form at the back reflects
17 who actually submitted the form and the rating.

18 **Q.** Did you pull these application files yourself to produce
19 them for purposes of this litigation?

20 **A.** I did.

21 **Q.** Are you aware, Ms. Bever, that SA1 is the application of
22 a current Harvard student who will testify in this case?

23 **A.** Yes.

24 **Q.** Who is this student's name?

25 **A.** Sally Chen.

1 **Q.** And you're aware Ms. Chen has agreed to have her
2 application file used in this litigation, right?

3 **A.** Yes.

4 MS. ELLSWORTH: I'd move to admit Exhibit SA1.

5 MR. McBRIDE: No objection, Your Honor.

6 THE COURT: It's admitted.

7 (Defendant Exhibit No. SA1 admitted.)

8 BY MS. ELLSWORTH:

9 **Q.** Let's take a look at this, the reader rating sheet that's
10 at page 40 that has your actual initials on it.

11 What ratings did you provide to Ms. Chen on her
12 academic profile?

13 **A.** I gave her a 2.

14 **Q.** And what preliminary overall rating did you assign to
15 Ms. Chen?

16 **A.** A 3+.

17 **Q.** Ms. Chen attended Lowell High School; is that right?

18 **A.** She did.

19 **Q.** And you read all the application files from Lowell High
20 School?

21 **A.** In that cycle, I read all the applications from Lowell
22 High School.

23 **Q.** How did Ms. Chen's application compare to the academic
24 credentials of other applicants from Lowell High School?

25 **A.** Lowell is a very strong school in the city of San

1 Francisco. I think I got between 30 and 50 applications from
2 Lowell in any given year.

3 Her academic credentials, her scores were a little
4 bit lower than many of her peers, and I would have seen many
5 perfect transcripts, meaning straight As, all four years.

6 **Q.** Let's take a look at page 22 of Exhibit SA1. What's
7 shown on page 22?

8 **A.** Page 22 is a teacher evaluation.

9 **Q.** And does this teacher comment on Ms. Chen's academic
10 abilities?

11 **A.** She does. She writes a beautiful letter about her
12 academic qualifications.

13 **Q.** Does she -- the final sentence in the first paragraph,
14 could you please read that, "I was happy."

15 **A.** "I was happy to see that Sally fits the pattern her older
16 sisters had established, combining exceptionally strong
17 academic strengths with the commitment to the communities
18 around her, including, in Sally's case, by working for a
19 mentor in the school's peer resources program, a role she is
20 particularly well suited for."

21 **Q.** Looking at the second paragraph of this teacher
22 recommendation, what does the teacher say about Ms. Chen's
23 academic work in the second paragraph?

24 **A.** She writes a very nice description of Sally's academic
25 work. The way she pulls ideas together, sort of her -- the

1 way she thinks about herself. Her critical thinking and
2 writing skills were exceptional, she says. So she sort of
3 rounds out her academic skills for us.

4 **Q.** Did the information provided in this letter of
5 recommendation from a teacher factor into your academic
6 rating of Ms. Chen?

7 **A.** I think this letter and others sort of showed the
8 academic strength Sally was bringing or would bring to
9 Harvard, yes.

10 **Q.** Let's take a look back at page SA5 of this application.
11 What does page SA5 -- what is the information provided on
12 page SA5?

13 **A.** It shows her family background.

14 **Q.** Does it include information about her parents'
15 occupations?

16 **A.** It does.

17 **Q.** What were the occupations of Ms. Chen's parents?

18 **A.** It says her father is a chef, employed, and her mother is
19 a homemaker.

20 **Q.** Is that information that you take into account when
21 reviewing an application file?

22 **A.** Yes.

23 **Q.** Is that information you took into account when reviewing
24 and assigning ratings to Ms. Chen's application file?

25 **A.** It certainly would have played a role, again, in sort of

1 my overall picture of her.

2 **Q.** And why is this information that's taken into account in
3 the admissions process?

4 **A.** Family background can play a role in sort of the choices
5 you are able to make, what you're doing. She writes about
6 her family in her essay in a way that helps us understand
7 sort of what she has to do for them. I think she talks about
8 translating for her family and her father working despite --
9 I think he had an injury. And all of that plays a role in
10 sort of who she is and how strong, sort of all the things
11 she's been able to accomplish.

12 **Q.** Does an applicant's parents' occupation provide
13 information just beyond the applicant's socioeconomic status?

14 **A.** Yes.

15 **Q.** What are some examples?

16 **A.** Again, a parent can play a role in sort of the type of
17 opportunities a student can get. Again, sort of what their
18 home duties might be, whether or not a student had access to
19 internships or other opportunities like that.

20 **Q.** Where is the information that's shown on this page 5 of
21 SA1, where does that information come from relating to parent
22 occupation?

23 **A.** It comes from -- in this case, it came from the common
24 app.

25 **Q.** And the common application is a standard-form

1 application?

2 **A.** Yes.

3 **Q.** Does Harvard control the way the common application codes
4 its information?

5 **A.** It does not.

6 **Q.** Does the common application ever change the coding fields
7 relating to parent occupation?

8 **A.** The common app makes changes to its application every so
9 often, yes.

10 **Q.** Do those changes in the coding fields affect the
11 admissions office's ability to consider the information an
12 applicant provides via that application?

13 **A.** No. We use the information as we see it.

14 **Q.** Have the changes made by the common application to the
15 parent occupation field affected -- prevented the admissions
16 office from considering an applicant's parents' occupation?

17 **A.** No. We would have used the information as it was
18 presented to us.

19 **Q.** And so as an admissions officer, you would have used the
20 information on page 5 of SA1?

21 **A.** Yes.

22 **Q.** Let's turn back to page 40 where the reader rating form
23 is.

24 What extracurricular rating did you assign to
25 Ms. Chen?

1 **A.** I gave her a 2.

2 **Q.** And while we are on this page, what is the rating that
3 you assigned to Ms. Chen's teacher recommendation that you
4 were previously discussing?

5 **A.** Was that teacher -- can I look? Sorry.

6 **Q.** Take your time.

7 **A.** What page was that? Do you remember?

8 **Q.** 22 and 23.

9 **A.** Yeah, so I gave that a 1.

10 **Q.** And that reflected your view that it was a strong --
11 excuse me -- a strong recommendation?

12 **A.** Yes.

13 **Q.** Keeping your 2 extracurricular rating in mind, please
14 turn to page 8 of Exhibit SA1. What does page 8 show?

15 **A.** So page 8 is what we call the extracurricular grid. It
16 includes a list of the activities that she was participating
17 in, how much time she spent, what academic years she
18 participated in them, and a description of them.

19 **Q.** And what does the information on page 8 of Ms. Chen's
20 application tell you about her extracurricular involvement?

21 **A.** So the first thing she lists is she was the first
22 violinist, which is obviously an important role in the
23 orchestra. She was also the Lowell student association
24 president.

25 So she had a number of research roles -- or

1 leadership roles. I'm sorry. She was doing research
2 mentoring. She had found some roles doing some research
3 as -- or work as a web designer. She was radio producer.
4 She had a lot of different interests. She was doing a lot of
5 different things.

6 **Q.** Can you turn please to page 20 of Exhibit SA1, which is
7 the guidance counselor recommendation.

8 **A.** Yes.

9 **Q.** Does this guidance -- are you there?

10 **A.** Yes.

11 **Q.** Does the guidance counselor's recommendation provide
12 information relating to Ms. Chen's extracurricular
13 involvement?

14 **A.** Yes.

15 **Q.** And what type of information?

16 **A.** So it talks about her internship at UCSF Mission Bay. It
17 provides some -- it actually -- I think this letter wasn't
18 the most helpful, but it does sort of describe some of the
19 things Sally had already described in her application. So at
20 least it reaffirmed her participation in some of these
21 things.

22 **Q.** I'm sorry. I didn't catch the end of it.

23 **A.** It just reaffirmed her participation in some of these
24 things.

25 **Q.** Did you factor that information into the extracurricular

1 rating you assigned her?

2 **A.** Yes.

3 **Q.** You read all the files for Lowell High School that year,
4 correct?

5 **A.** I did.

6 **Q.** Did the guidance counselor provide a letter for every
7 single applicant?

8 **A.** Lowell is a big school with just a few counselors, and so
9 they are unable to provide letters for every student, even
10 sometimes their top students.

11 **Q.** But they did provide a letter for Ms. Chen, correct?

12 **A.** They did provide a letter for her.

13 **Q.** Did that provide you information about what the school
14 thought of Ms. Chen?

15 **A.** Yes.

16 **Q.** Did the fact that they wrote a letter in this case
17 provide you information about what the school thought of
18 Ms. Chen?

19 **A.** Yes, that they knew her was important.

20 **Q.** Looking back at page 40, the rating sheet, what personal
21 rating did you assign to Ms. Chen?

22 **A.** I gave her a 2.

23 **Q.** And looking back at page 20 which has the guidance
24 counselor recommendation, did the guidance counselor's
25 recommendation provide information about Ms. Chen other than

1 the extracurricular information you just discussed?

2 **A.** Yes. I mean, it talks at the very top, she's a
3 well-spoken, ambitious, and humorous person. So throughout
4 the letters, there are descriptions of her personal
5 qualities.

6 **Q.** Turning to page 27, please, of the application.

7 Is this another teacher recommendation letter?

8 **A.** It is.

9 **Q.** Can you please read the third paragraph from the bottom,
10 beginning "Sally"?

11 **A.** It says. "Sally fits no mold. She is her own person and
12 pursues her interests with great vigor. Sally manages to
13 master new skills and knowledge with ease."

14 **Q.** Can you read the next sentence at the beginning of the
15 next paragraph?

16 **A.** "Sally is truly an exceptional student in so many ways.
17 She is highly capable academically, clearly in the top few
18 percent of all college-bound students I have taught."

19 **Q.** Did these recommendations inform the personal rating you
20 assigned to Ms. Chen?

21 **A.** Yes.

22 **Q.** Did the guidance counselor letter that you were just
23 discussing inform the personal rating that you assigned to
24 Ms. Chen?

25 **A.** Yes.

1 **Q.** The profile ratings we've just been discussing, are those
2 the only factors that the admissions office considered about
3 Sally's application?

4 **A.** No. We would have looked at all of her application.

5 **Q.** Take a look back at the first page of the application
6 file, which is page 1. Are there profile ratings from the
7 docket chair for Ms. Chen's case?

8 **A.** There is just an overall rating.

9 **Q.** Do you know why?

10 **A.** Yes.

11 **Q.** Tell us why, please.

12 **A.** So my recollection of Sally is that we were in
13 subcommittee and we were going through all of the applicants
14 from Lowell High School. And my colleague Roger Banks
15 stopped us and said, "Erica, you read this application quite
16 strongly, but it doesn't look like you passed it" -- there
17 would have been no 2 there. "Can we take a closer look?"

18 And so in subcommittee we went through it page by
19 page, all of us reading it. And when I read it, she was
20 missing an interview, which I was hoping would set her apart
21 and help further set her apart.

22 And we all read it together and agreed that it came
23 together quite nicely. And again, I think at that point the
24 subcommittee made a preliminary recommendation to admit her,
25 and she hung on.

1 So Christine went back in and would have put an
2 overall. But since she read it in committee, she may not
3 have put in all of the ratings.

4 **Q.** You mentioned that the interview information had not come
5 in when you first read the file. Do I have that right?

6 **A.** Yes.

7 **Q.** Is that a common occurrence?

8 **A.** It very much depends on when your subcommittee is meeting
9 and when you're doing readings. So it looks like I read this
10 on January 18, and that's pretty early in our process. Our
11 interviewers probably had not read or interviewed most of our
12 students at that point.

13 **Q.** When you're referring to the interviewer, you're
14 referring to the alumni interviewer?

15 **A.** Yes.

16 **Q.** If you look at page 29 of SA1, is there an alumni
17 interview report?

18 **A.** Hold on. Yes.

19 **Q.** And did the Harvard alumnus who met with Sally write a
20 positive account of their interview?

21 **A.** They did. It was very helpful.

22 **Q.** And did you take that into account in the subcommittee
23 process in discussing Ms. Chen's file?

24 **A.** We would have, yes.

25 **Q.** Did the subcommittee ultimately recommend Ms. Chen for

1 admission?

2 **A.** Yes.

3 **Q.** And ultimately she was admitted, right, and attends
4 Harvard?

5 **A.** She was, yes.

6 **Q.** Were you concerned that you had originally not passed
7 Ms. Chen's file on to your docket chair?

8 **A.** I think I was. But you know, that's why we have the
9 committee review process and we can all go through and see
10 and have someone else catch it.

11 **Q.** Ms. Bever, in your time working in the admissions office,
12 how many times have you seen another admissions officer
13 demonstrate bias against an applicant because of the
14 applicant's race?

15 **A.** I've never seen that happen.

16 **Q.** When considering whether to admit an applicant, is an
17 applicant's race ever a negative factor?

18 **A.** No.

19 **Q.** Have you ever admitted an applicant because of his or her
20 race?

21 **A.** I could not say that, no.

22 **Q.** Have you ever rejected an applicant because of his or her
23 race?

24 **A.** No.

25 **Q.** In your view, is it important that Harvard has a diverse

1 student community?

2 **A.** It is.

3 **Q.** Why?

4 **A.** I think it's important that we as students learn from
5 each other, and students of different background bring
6 different perspectives to issues that are important.

7 **Q.** In your view, does racial diversity have benefits?

8 **A.** It does.

9 **Q.** What are those benefits?

10 **A.** Again, I think we learn from people who come from
11 different places and different perspectives, and that's part
12 of who we should be, as educated.

13 **Q.** Have you ever been instructed to admit a target number of
14 students from any racial or ethnic background?

15 **A.** No.

16 **Q.** Based on your years working in the admissions office,
17 what is your view of the evaluation process employed by
18 Harvard in the admissions office?

19 **A.** It's incredibly labor-intensive. It takes incredible
20 care and time in order to find exceptional students. There
21 are moments that are very difficult when we have to, you
22 know, reject students who are exceptional. But we make
23 choices, and it always feels great when you get to see the
24 sort of final students who come through and meet us during
25 our visiting program. It feels worth it.

1 MS. ELLSWORTH: Thank you. No further questions.

2 FURTHER EXAMINATION

3 BY MR. McBRIDE:

4 Q. Ms. Bever, just a few more questions for you.

5 You talked about parental occupation and admissions
6 with Ms. Ellsworth.

7 A. Yes.

8 Q. And I heard you talking about things that were in the
9 common application that you were relying on with relationship
10 to parental occupation?

11 A. Yes.

12 Q. And I understood you to be saying that you rely on the
13 category of occupation from the common application?

14 A. So there's a number of things that are printed here. It
15 includes often an actual category. It includes an employment
16 status. Sometimes there's more information.

17 Q. The common application also allows an applicant to
18 identify, for example, the parents' employer. Is that right?

19 A. So at the moment, I'm not recalling. That may be the
20 case.

21 Q. Well, then that can come through to your summary sheet as
22 well, right, what's in the common application with respect to
23 the employer?

24 A. I don't think it appears on our summary sheet.

25 Q. So it doesn't appear on your summary sheet, who the

1 parents' employer is?

2 **A.** I don't think so. I think their education comes through.
3 And it's not on this one, yeah. I'm not --

4 **Q.** Does it matter to you, then, whether -- what the parents'
5 employer is if you do have that information on the summary
6 sheet?

7 **A.** Again, I'm not sure it's on the summary sheet.

8 **Q.** Well, let me ask you this. You consider the whole person
9 when you're looking at these applicants; is that correct?

10 **A.** That's correct.

11 **Q.** And you're looking at the parental occupation associated
12 with that whole person's -- sorry, withdrawn.

13 You are looking at the whole person with respect to
14 what those parents do; is that right?

15 **A.** Whole -- I'm not sure what you mean.

16 **Q.** Withdrawn.

17 Just to clear up for the record, do you know
18 whether or not the parents' employer is included on the
19 common application?

20 **A.** I'm sorry. At the moment I can't remember whether the
21 employer is actually included.

22 **Q.** If you get the information with respect to the parents'
23 employer off the common application or some other way, if
24 that appears on the summary sheet, would you consider that as
25 part of your whole person evaluation?

1 **A.** Again, if we can see the information we might take it
2 into account, if it was important for that particular
3 applicant.

4 **Q.** And would it be important if that parents' employer, for
5 example, were a small business owner, say the owner of a
6 small grocery store, as opposed to a business owner who owned
7 a large corporation?

8 **A.** Again, if it was important to the student and the student
9 elevated that as a part of their experience, then it might
10 matter.

11 MR. McBRIDE: No further questions.

12 MS. ELLSWORTH: Nothing further, Your Honor.

13 THE COURT: You're excused.

14 THE WITNESS: All right. Thank you.

15 MS. HACKER: Your Honor, if we could have a few
16 minutes. We can take our morning break if you want or --

17 THE COURT: Either way. Do you all want a break?
18 Either way is fine with me.

19 MS. ELLSWORTH: I think we're fine to go ahead.

20 MS. HACKER: Your Honor, at this time SFFA calls
21 Erin Driver-Linn.

22 (ERIN DRIVER-LINN duly sworn by the Deputy Clerk.)

23 COURTROOM CLERK: Would you please state your name
24 spell your last name for the record.

25 THE WITNESS: Erin Driver-Linn. D-R-I-V-E-R hyphen

1 L-I-N-N.

2 EXAMINATION

3 BY MS. HACKER:

4 **Q.** Good morning, Ms. Driver-Linn. My name is Kat Hacker.
5 We haven't had a chance to meet before. Thank you for being
6 here today. I want to start by talking about your background
7 that led you to become involved in the office of
8 institutional research.

9 You have a doctorate degree in social psychology,
10 right?

11 **A.** Yes, I do.

12 **Q.** You got that degree from Harvard?

13 **A.** I did.

14 **Q.** To get your doctorate, you took classes in statistical
15 analysis methods, correct?

16 **A.** I did.

17 **Q.** Let me take a step back for a second.

18 I understand you prefer to be called
19 Ms. Driver-Linn despite the fact that you have a doctorate?

20 **A.** Yes.

21 **Q.** I just want to make sure I'm using your preference.

22 Before joining OIR, you had almost a decade of
23 experience in statistical analysis, correct?

24 **A.** Correct, roughly.

25 **Q.** Then in 2008, you got the job as director of the office

1 of institutional research?

2 **A.** That's right.

3 **Q.** In that job, you were responsible for overseeing OIR?

4 **A.** That's right.

5 **Q.** You maintained that responsibility from 2008 until fairly
6 recently, right?

7 **A.** Yes, that's correct.

8 **Q.** So for about ten years, you were the person in charge at
9 OIR?

10 **A.** That's correct.

11 **Q.** Ms. Driver-Linn, before we get into talking about the
12 substance of your work with OIR today, I'd like to spend a
13 few minutes talking about a committee that you served on back
14 in 2014.

15 **A.** Okay.

16 **Q.** What I've put on the screen for you is Exhibit P299.
17 I'll blow it up so you can see it.

18 Do you recognize this as an email that you received
19 on June 13, 2014?

20 **A.** I do. Would it be okay if I look at the binder?

21 **Q.** Of course. Every exhibit we're going to look at today is
22 in that binder. If you want to look at a hard copy, please
23 feel free. It's P299.

24 Do you have that in front of you, Ms. Driver-Linn?

25 **A.** I do.

1 **Q.** Is this an email that you received on June 13, 2014?

2 **A.** Yes.

3 **Q.** And this was sent from Mr. Iuliano's assistant. Is that
4 right?

5 **A.** That's correct.

6 **Q.** Mr. Iuliano is Harvard's general counsel?

7 **A.** That's right.

8 MS. HACKER: Your Honor, SFFA offers P299.

9 MS. ELLSWORTH: No objection.

10 THE COURT: It's admitted.

11 (Plaintiff Exhibit No. P299 admitted.)

12 BY MS. HACKER:

13 **Q.** Now, you see the subject of this email is "Ryan
14 Committee," right?

15 **A.** I do.

16 **Q.** Then we're going to scroll down to the bottom, the first
17 email in this chain. And it says, 'On behalf of President
18 Faust and Dean Ryan, thank you again for agreeing to serve on
19 the committee." Do you see that?

20 **A.** I do.

21 **Q.** You did, in fact, serve on the Ryan Committee?

22 **A.** Yes.

23 **Q.** And then in this top email, it says, "Our first meeting
24 will be June 26, 2014." Is that right?

25 **A.** Yes.

1 **Q.** So that is the first meeting of the Ryan Committee,
2 correct?

3 **A.** To the best of my knowledge, yes.

4 **Q.** Then do you remember there being a second meeting of the
5 Ryan Committee that occurred on August 27, 2014?

6 **A.** I don't have a specific memory of that meeting.

7 **Q.** Let me show you a document and see if it helps refresh
8 your recollection. And you can flip to it if you want. It's
9 P303. And what I'd like you to look at I've highlighted here
10 on the screen. That may help make things go a little bit
11 faster.

12 Do you see the entry that says "Ryan Subcommittee"
13 and the date is August 27, 2014?

14 **A.** I do.

15 **Q.** Does that refresh your recollection that there was a
16 meeting of the Ryan Committee on that date?

17 **A.** No, it doesn't.

18 **Q.** You don't remember having a meeting on that date?

19 **A.** I don't have a specific memory.

20 **Q.** Let's look together at P300 next, and I'd actually like
21 to start on the second page of this document, put it up on
22 our screen.

23 THE COURT: You want to move to admit 299?

24 MS. HACKER: No, Your Honor. Just used it to
25 refresh her recollection.

1 THE COURT: Okay.

2 BY MS. HACKER:

3 Q. Are you with me, Ms. Driver-Linn?

4 A. Sorry. The second page.

5 Q. You see here there's an email from James Ryan?

6 A. Yes.

7 Q. And that email gets sent to you and a number of other
8 people?

9 A. Yes.

10 MS. HACKER: Your Honor, SFFA offers P300.

11 MS. ELLSWORTH: Your Honor, the first page of this
12 document this witness has no foundation for. The second page
13 we don't object to. I'm not sure how you'd like to handle
14 that.

15 MS. HACKER: Let me just try to address this.

16 BY MS. HACKER:

17 Q. Ms. Driver-Linn, do you see the first page of this
18 document? I've blown it up on your screen.

19 A. Yes.

20 Q. And then down here at the bottom it says, "Attachments,
21 correspondence." Do you see that?

22 A. I do.

23 Q. And the attachment is, in fact, this correspondence that
24 you received, correct?

25 A. I assume so. I don't know.

1 **Q.** Do you assume you received these documents together? Is
2 it typical to get memos with attachments within Harvard?

3 MS. ELLSWORTH: Your Honor, this is
4 mischaracterizing the document. It's a briefing for somebody
5 that is not Ms. Driver-Linn. I have no objection to the
6 second page. It's just the first page.

7 THE COURT: Clearly you get the second page. You
8 don't have the first page yet. I don't know if you can get
9 her there or not. But if you don't need the first page,
10 maybe you just want to move on. But if you do need it,
11 you're going to have to keep working at her.

12 MS. HACKER: That's fine. Let's -- how about we
13 offer P300, the second page, Your Honor.

14 THE COURT: Yes, admitted.

15 (Plaintiff Exhibit No. P300 admitted.)

16 BY MS. HACKER:

17 **Q.** Let's focus on the second page. Do you see this as an
18 email from James Ryan?

19 **A.** I do.

20 **Q.** And the subject of this email is "Diversity committee
21 meeting." Do you see that?

22 **A.** Yes, I do.

23 **Q.** And we already went over this. You're on this email and
24 there's a number of other people in the "To" and "CC" lines.
25 Do you see that?

1 **A.** I do.

2 **Q.** Were these other people in the "To" lines the other
3 members of the Ryan Committee as of December 3rd, 2014?

4 **A.** I couldn't be sure. I'd have to compare the names. I
5 think so.

6 **Q.** And Mr. Ryan was the chair of this committee, correct?

7 **A.** Yes.

8 **Q.** What I'm going to show you now is demonstrative. It's
9 marked PD19. Do you see that on your screen?

10 **A.** Yes.

11 **Q.** Now, you can see what I've done is I've taken all the
12 names -- and you have P300 in front of you on the hard
13 copy -- we've taken all of those names and we've put them
14 into this slide.

15 You see James Ryan there at the top, right?

16 **A.** I do.

17 **Q.** And back in December of -- he was the dean of Harvard's
18 graduate school of education?

19 **A.** That's right.

20 **Q.** And the people below it, are these the other people who
21 you served on the Ryan Committee with?

22 MS. ELLSWORTH: Your Honor, I've already informed
23 Ms. Hacker we object to the demonstrative only to the extent
24 the witness is not able to verify whether these are, in fact,
25 members of the Ryan Committee, which she just testified to.

1 It's a demonstrative. I'm fine to have her go to through it,
2 but I just wanted to lodge that objection.

3 THE COURT: She's asked if these are the people who
4 are on the Ryan Committee, and her answer is going to be her
5 answer. They're not moving to admit it, so it doesn't need
6 to be authenticated.

7 BY MS. HACKER:

8 Q. Ms. Driver-Linn, do you recognize these people on this
9 slide as the people you served on the Ryan Committee with?

10 A. I really am not sure. I can't remember serving on a
11 committee with all of these people and being in a room
12 together with them.

13 Q. That's fair. So you just didn't meet with them enough to
14 be able to recognize all of these people now?

15 A. I'm not sure that's how I'd characterize it. I just
16 couldn't tell you for sure if this is the membership of the
17 Ryan Committee and if we were all in a room together meeting.

18 Q. Now, we talked -- we saw in P300, the second page of it,
19 that there was a meeting of the Ryan Committee in December
20 of 2014. Was the committee in fact disbanded after that
21 point?

22 A. I'm not sure about being disbanded. I know we stopped
23 meeting at some point.

24 Q. And did you stop meeting at the end of 2014?

25 A. I think so.

1 **Q.** Did anyone ever explain to you why you stopped meeting
2 after that point?

3 **A.** I don't think it was explained to me.

4 **Q.** And the Ryan Committee met so few times you don't recall
5 whether you ever discussed race-neutral alternatives to the
6 admissions process, correct?

7 **A.** I have a hazy recollection of a number of large committee
8 meetings right around that timeframe. I don't feel confident
9 that I can say with certainty whether we discussed
10 race-neutral alternatives.

11 **Q.** You don't recall specifically whether you discussed
12 race-neutral alternatives?

13 **A.** I don't recall specifically.

14 **Q.** And you don't recall ever being asked as part of the Ryan
15 Committee to do any analysis of the alternatives to using
16 race in the college admissions process?

17 **A.** I'm sorry. Could you repeat the question?

18 **Q.** Sure. You don't recall ever being asked as part of the
19 Ryan Committee to do any analysis of the alternatives to
20 using race in the college admissions process?

21 **A.** I believe that the team did some work, under privilege.

22 **Q.** The team did some work. And I'm sorry I couldn't hear
23 you.

24 **A.** Under direction of counsel.

25 **Q.** But you don't recall ever being asked as part of the Ryan

1 Committee to do any analysis of the alternatives to using
2 race in the college admissions process?

3 **A.** I don't recall that specifically.

4 **Q.** Now, let's turn to talking about some of the work OIR did
5 in early 2013. I first want to make sure we're on the same
6 page in terms of the context of that work.

7 You're familiar with the article that Ron Unz
8 wrote, called "The Myth of American Meritocracy," right?

9 **A.** Generally.

10 **Q.** One of the claims, among other things, that Unz's article
11 focused on was a claim that Harvard was capping
12 Asian-American admissions?

13 **A.** I can't remember specifically if that was one of the
14 exact claims.

15 **Q.** You don't remember whether Ron Unz's article discussed
16 whether Harvard caps Asian-American admissions?

17 **A.** I remember that article making a number of claims. I
18 remember that Harvard's name was in them.

19 **Q.** And the Unz article was picked up by the New York Times
20 on Christmas Eve in 2012, right?

21 **A.** Yes.

22 **Q.** That got the attention of a number of people at Harvard,
23 including people at OIR?

24 **A.** Yes. I believe we were -- that was brought to our
25 attention in that timeframe.

1 **Q.** Do you remember sending and receiving a number of emails
2 over the holidays concerning the Unz article?

3 **A.** I don't have a specific memory of those email exchanges.

4 **Q.** Well, Ms. Driver-Linn, what I'd like you to do is turn to
5 P460 in your binder in front of you and see if we can help
6 refresh your memory about the number and dates of those
7 emails so we can piece together a timeline of what was going
8 on back then. Let me know when you have it.

9 **A.** Okay. I have it. Yes.

10 **Q.** Now, what you have in front of you is something called a
11 privilege log that Harvard's attorneys provided to us. I
12 don't want to talk about the substance of any of these emails
13 because they're privileged. But I'd like to walk through
14 just how many emails you were sending and receiving on this
15 topic back then.

16 So if you flip with me to the second page, we see
17 there is an email between you and Dean Fitzsimmons on
18 December 28, 2012. Do you see that?

19 **A.** I do.

20 **Q.** And the subject of that email is "American Conservative
21 article." Is that right?

22 **A.** Yes, I see that.

23 **Q.** You understand that to be referring to Mr. Unz's article
24 that was published in American Conservative?

25 **A.** Yes, I do.

1 **Q.** And then if you flip to the next page, page 3, at the
2 very top we see two more emails between you and Dean
3 Fitzsimmons on December 28, 2012. Right?

4 **A.** Yes, I see that.

5 **Q.** Those are also about Unz's article?

6 **A.** They also have "The American Conservative article" as the
7 file subject name.

8 **Q.** And if we go down the page, there are 13 more emails back
9 and forth between you and other Harvard employees on
10 December 29, 2012?

11 **A.** I see that.

12 **Q.** All of those emails are also about Unz's article, right?

13 **A.** They all have that same subject line.

14 **Q.** And some of the people you were emailing with on this day
15 include Dean Fitzsimmons?

16 **A.** Yes.

17 **Q.** Some of these emails are between you and Alan Garber?

18 **A.** I see that.

19 **Q.** He's the provost at Harvard, right?

20 **A.** That is correct.

21 **Q.** He's one of the top officials in the entire university?

22 **A.** Yes.

23 **Q.** Is he -- was he at the time your boss's boss's boss? Is
24 that right, three levels up?

25 **A.** No. Two.

1 Q. How often did you email directly with Mr. Garber?

2 A. It's difficult to answer that question with any
3 precision. Can you be more specific?

4 Q. Was it not that often that you'd email with Mr. Garber?
5 Were you emailing with him every day?

6 A. I don't think every day. I don't think it's unusual for
7 me to have emailed with him.

8 Q. And you're also emailing around this time a number of
9 people within your office, OIR, right?

10 A. That's correct.

11 Q. Including Ms. Bever?

12 A. Yes, I see that.

13 Q. And Mr. Hansen?

14 A. Yes.

15 Q. And then on the next page we see some more emails you're
16 continuing to send and receive, again related to the Unz
17 article, right?

18 A. Yes. They still have that same subject line.

19 Q. And it looks to me like there's about ten more emails
20 between December 29 and January 2 on this page?

21 A. I see that the subject line does change.

22 Q. Do you believe these emails were still related to the Unz
23 article?

24 A. I can't be sure.

25 Q. And if you look down to the entry that's number --

1 Document Number 20, you see that that is an email you sent to
2 the folks at OIR on New Year's Eve, 2012. Is that right?

3 **A.** December 31, yes.

4 **Q.** And you sent it at about 9:20 p.m. on New Year's Eve?

5 **A.** It looks like it.

6 **Q.** I hope that's pretty unusual for you to be working that
7 late on a holiday.

8 **A.** I'm not sure.

9 **Q.** Did you try not to bother your employees on a holiday if
10 you didn't have to?

11 **A.** I would typically try to not bother my employees on a
12 holiday.

13 **Q.** And then if you flip with me through the next five pages,
14 pages 5 through 10. I don't want to walk through each one
15 individually. But now we're into the new year in 2013,
16 right?

17 **A.** Yes.

18 **Q.** And if you count pages 5 through 10, it looks to me like
19 you send or receive 61 more emails in January of 2013 related
20 to these issues.

21 **A.** I see a number of highlights with my name. And I think I
22 see the subject line changing some.

23 **Q.** 61 looks about right? 60?

24 **A.** I'll take your word for it.

25 **Q.** Some of those emails again were to Provost Garber?

1 **A.** I don't see any others to Provost Garber.

2 **Q.** Look with me on page 5, Ms. Driver-Linn.

3 You see about four entries from the top there's
4 another email, two emails between you and Dean Fitzsimmons
5 and Provost Garber?

6 **A.** Yes.

7 **Q.** Some of these emails are also back and forth between all
8 of the OIR employees, right?

9 **A.** Yes.

10 **Q.** And some of these emails, a few of them are with someone
11 named Elizabeth Yong. Is that right, on page 6?

12 **A.** Yes, I see that.

13 **Q.** Part of her job at Harvard was to maintain the database
14 of admissions data, right?

15 **A.** I don't -- I don't know what her job description is. I
16 know she had some work that she did with admissions data in
17 the office of admissions and financial aid.

18 **Q.** And when people at OIR needed admissions data, would you
19 often reach out to Ms. Yong?

20 **A.** Ms. Yong was often our contact person for that.

21 **Q.** Given all the emails we see going back and forth between
22 Christmas 2012 and January 2013, it's fair to say that this
23 article got some attention from Harvard's leaders, right?

24 **A.** Sure.

25 **Q.** So turning to 2013. In the beginning of 2013, OIR was

1 doing work related to Harvard's admissions process that
2 concerned the question of Harvard's treatments of whites as
3 compared to Asian-American applicants, right?

4 **A.** I'm sorry. Could you repeat that question?

5 **Q.** Sure. In the beginning of 2013, OIR was doing work
6 related to Harvard's admissions process that concerned the
7 question of Harvard's treatment of white applicants versus
8 Asian-American applicants, right?

9 **A.** No. I don't think that's how I'd characterize it.

10 **Q.** Well, the reason OIR was looking at that difference was
11 because there was a concern about Harvard potentially
12 treating those two groups, white applicants and
13 Asian-American applicants, differently, right?

14 **A.** No. At that time my understanding is we were doing some
15 work under direction of counsel, and we were -- the office
16 was doing other work that was not at the direction of
17 counsel.

18 **Q.** I'm not focused on who directed the work.

19 But in early 2013, there was -- OIR was looking at
20 the difference between white and Asian-American applicants,
21 right?

22 **A.** We did analytic work that included looking at different
23 groups and the admissions process.

24 **Q.** And you were doing that work because there was a concern
25 about the difference between Asian and white applicants at

1 the time?

2 **A.** My sense of what we were doing is, in the work that
3 wasn't under direction of counsel, was roughly in response to
4 the Unz article, that it was sort of in the ether at the
5 time.

6 **Q.** It was in the -- that was a concern because it was in the
7 popular press at the time?

8 **A.** That's correct.

9 **Q.** So to take a look at the issue, OIR put together a
10 regression analysis, right?

11 **A.** No.

12 **Q.** OIR put together a logistic regression model?

13 **A.** The part I was referring to is to address a particular
14 question.

15 I think, if I'm understanding what you're talking
16 about, the work that you're talking about, there were a
17 series of models that were being looked at to try to model
18 the admissions process.

19 **Q.** And you're generally familiar with logistic regression
20 analysis?

21 **A.** Generally.

22 **Q.** OIR has used these types of analyses before?

23 **A.** Yes.

24 **Q.** And there are people in OIR who can competently execute
25 logistic regression analyses, right?

1 **A.** I'd say the office can competently do logistic
2 regression.

3 **Q.** Let's take a look together at P9. It's also in your
4 binder if you'd like to take a look at the hard copy.

5 Ms. Driver-Linn, you recognize this document,
6 right?

7 **A.** I do.

8 MS. HACKER: Your Honor, SFFA offers P9.

9 MS. ELLSWORTH: Your Honor, I think I need a little
10 more foundation on this.

11 THE COURT: Isn't it already admitted?

12 MS. ELLSWORTH: This is not admitted.

13 MS. HACKER: This has been used with another
14 witness, Your Honor, so that we didn't have to recall Dean
15 Fitzsimmons. But it actually hasn't been admitted into
16 evidence yet.

17 BY MS. HACKER:

18 **Q.** Ms. Driver-Linn, you were designated as Harvard's
19 corporate representative to talk about OIR reports at your
20 deposition, right?

21 **A.** That's right.

22 **Q.** And this is one of the documents you reviewed to prepare
23 to testify on Harvard's behalf about OIR reports; is that
24 right?

25 **A.** I'm sorry. I can't quite remember which part of the

1 deposition was as the corporate representative and which part
2 was not.

3 **Q.** Do you remember being designated as a corporate
4 representative to talk about OIR reports and this report
5 specifically at your deposition?

6 **A.** I remember talking about this document specifically at
7 the deposition.

8 MS. HACKER: Your Honor, SFFA offers P9.

9 MS. ELLSWORTH: Your Honor, I'm not sure being a
10 corporate representative at deposition lays foundation. The
11 witness testified at her deposition she didn't recall the
12 document from 2013. She can certainly speak to it. We don't
13 object it to being used in the same way with Dean
14 Fitzsimmons. I'm just not sure that a foundation has
15 actually been laid.

16 THE COURT: I am going to let her testify about it.

17 MS. HACKER: If I may, just one more question on
18 this. I think I may be able to clear this up.

19 THE COURT: I'm wondering who is going to be able
20 to lay a foundation for them. And the document seems fair
21 game.

22 MS. ELLSWORTH: There is an individual who will be
23 testifying later who is the person who created the document
24 who would be the likely person to lay a foundation with.

25 THE COURT: So you can get it now through her, or

1 we'll do it through a later witness. But you can certainly
2 question her about it now. If you want to try and get it in
3 through her, that's fine.

4 BY MS. HACKER:

5 **Q.** Ms. Driver-Linn, you've seen this document or one very
6 much like it, correct?

7 **A.** Yes, I have.

8 MS. HACKER: Your Honor, this witness has
9 foundation. She's seen the document. She reviewed it for
10 her deposition. She oversaw the office of institutional
11 research that created this document for ten years. She
12 certainly has foundation to testify about it.

13 THE COURT: Well, I'm going to let her testify
14 about it. I'm not sure you've elicited -- you may be able to
15 elicit a foundation based on the fact that she oversaw the
16 work of the office during that time period and what her
17 responsibilities were in that way, but I don't think you've
18 laid it yet. Or that you have a chance to lay it with her or
19 they're representing that the author of the document will be
20 on later. So you can try it through her. And if it doesn't
21 come in through her, it will come in later. I don't think
22 they're objecting to you putting it up on the screen now, in
23 any event.

24 MS. ELLSWORTH: No, and the witness can be
25 questioned on it. No objection on that. It's just a

1 foundation issue.

2 BY MS. HACKER:

3 Q. Ms. Driver-Linn, let's start with the date on the first
4 page of this document. You see that it says February 14,
5 2012, right?

6 A. I do see that.

7 Q. But this document was actually created in February
8 of 2013?

9 A. I believe so.

10 Q. And you believe it's likely that this document was
11 created by Erica Bever and/or Mark Hansen?

12 A. No. I believe it was Mark Hansen.

13 Q. Ms. Bever -- I'm sorry.

14 Ms. Driver-Linn, you remember testifying in a
15 deposition in this case, right?

16 A. I do.

17 Q. You were under oath during that deposition?

18 A. Yes.

19 Q. In fact, the very same oath you're under today?

20 A. Yes.

21 MS. HACKER: Permission to approach, Your Honor?

22 THE COURT: Yes.

23 BY MS. HACKER:

24 Q. Ms. Driver-Linn, I'd like you to turn with me in your
25 deposition to page 99 where -- I've put it up here on the

1 screen if you'd like to take a look at that. I'd like you to
2 look at with me lines 12 through 22.

3 "Who prepared this document?

4 "I'm not sure.

5 "QUESTION: You don't have any idea who prepared
6 this document?

7 "ANSWER: That's not what I said.

8 "QUESTION: What do you know about who prepared
9 this document?

10 "ANSWER: I think it likely involved Erica Bever
11 and/or Mark Hansen."

12 Were you asked those questions and did you give
13 those answers at your deposition?

14 **A.** Yes.

15 **Q.** Now let's go back to P9. And in this document, OIR used
16 data from the classes of 2007 through 2016; is that right?

17 **A.** Sorry, that's -- are we looking at a particular page?

18 **Q.** You can look at the pages if you'd like. I think page 3
19 shows those years. Do you see those here at the bottom?

20 **A.** Yes, I do.

21 **Q.** So that's ten years of data, right?

22 **A.** Yes.

23 **Q.** And I'd like to look at page 5 together. This page shows
24 us the difference in average test scores and ratings for
25 white and Asian applicants, right?

1 **A.** That's the title on the graphic, yes.

2 **Q.** I'd like to start here at the bottom in these notes. We
3 see here that this excludes legacies and athletes, correct?

4 **A.** Yes. It also says OIR doesn't have the ratings for all
5 years.

6 **Q.** But it does exclude legacies and athletes?

7 **A.** Yes.

8 **Q.** If we zoom in on this chart so we can all see it
9 together, we have a line going down right here at zero,
10 right?

11 **A.** Yes.

12 **Q.** And the way this works is anything to the right of the
13 line means that Asians are higher, on average, right?

14 **A.** Yes.

15 **Q.** And anything to the left of the line means whites are
16 higher?

17 **A.** That's the way this graphic is labeled and how it's
18 organized.

19 **Q.** We see for the first two variables that Asian-American
20 applicants do better on both SAT II averages and SAT
21 averages, right?

22 **A.** They have a higher rating.

23 **Q.** And then if we go down to the third variable,
24 Asian-American applicants have a higher rating on the alumni
25 rating 2, as well?

1 **A.** Yes. This particular graphic and this exercise, that's
2 what you see.

3 **Q.** Is that the alumni personal rating versus the alumni
4 overall rating?

5 **A.** I don't know what these ratings are. I don't think we
6 can tell from this.

7 **Q.** Then if we go down, the next four categories were pretty
8 close to even between white applicants and Asian-American
9 applicants, right?

10 **A.** Those ratings are smaller.

11 **Q.** And then if we focus down on this personal rating, here
12 we see this is the only variable where white applicants score
13 a good deal better than Asian-American applicants to Harvard,
14 right?

15 **A.** This is a -- that's what you see on this chart.

16 **Q.** And you don't believe that this difference between white
17 and Asian applicants on the personal rating is based on any
18 errors in analysis of data by OIR, right?

19 **A.** I don't think this is a product that has errors, so to
20 speak. But I do think it's a very exploratory and limited
21 graphic.

22 **Q.** But you don't believe this chart is based on any errors
23 in analysis of the data?

24 **A.** I don't have any reason to believe it's based on an
25 error.

1 **Q.** Now, let's move on to February of 2013. You met with
2 Dean Fitzsimmons and some others from OIR on February 25,
3 2013, right?

4 **A.** Yes.

5 **Q.** And the work that OIR had done analyzing how race factors
6 into admissions at Harvard was shared with Dean Fitzsimmons
7 during that February 25 meeting?

8 **A.** I'm sorry. Could you repeat the question?

9 **Q.** Sure. The work that OIR had done analyzing how race
10 factors into admissions at Harvard was shared with Dean
11 Fitzsimmons during the February 25 meeting?

12 **A.** That's not how I'd characterize that, the work that was
13 shared with Dean Fitzsimmons that day.

14 **Q.** The work that OIR had been doing was shared with Dean
15 Fitzsimmons that day, right?

16 **A.** That's my understanding.

17 **Q.** And you would have reviewed that work and made any
18 comments you thought were appropriate before presenting it to
19 Dean Fitzsimmons?

20 **A.** I think that's likely.

21 **Q.** You certainly didn't knowingly share any analysis with
22 Dean Fitzsimmons that you believed to be incorrect?

23 **A.** No, I wouldn't share something we knew was incorrect.

24 **Q.** You wouldn't have shared work with Dean Fitzsimmons that
25 you considered shoddy?

1 **A.** No.

2 **Q.** And since you were the head of OIR, you doubt anyone
3 would have shared information with Dean Fitzsimmons if you
4 had objected to it?

5 **A.** I don't think so.

6 **Q.** You felt comfortable sharing OIR's analysis with Dean
7 Fitzsimmons because Dean Fitzsimmons loved to talk about
8 statistics?

9 **A.** I think I felt comfortable sharing work with Dean
10 Fitzsimmons for a number of reasons. One is that he did like
11 to talk about data.

12 **Q.** During that February 25, 2013 meeting, you don't recall
13 Dean Fitzsimmons disagreeing with the models created by OIR,
14 right?

15 **A.** I do not.

16 **Q.** You don't recall anyone asking any follow-up questions
17 during or after that February 25 meeting?

18 **A.** I don't have specific memories of that meeting.

19 **Q.** You don't recall taking any steps after the February 25
20 meeting to correct anything in OIR's analysis that was shared
21 with Dean Fitzsimmons?

22 **A.** I'm sorry. Could you repeat that again?

23 **Q.** Sure. You don't recall taking any steps after the
24 February 25 meeting to correct anything in OIR's analysis
25 that was shared with Dean Fitzsimmons?

1 **A.** I do remember that there were exchanges around trying to
2 refine and increase the variables that we might have in our
3 data. So I do think there were steps taken to work on some
4 of the things that were presented that day.

5 **Q.** But there were no steps taken to correct anything in the
6 reports shared with Dean Fitzsimmons, right?

7 **A.** I'm not -- I don't think of this as a report, this kind
8 of work that we were sharing. I think there may have been
9 work to try to improve and continue working on some of what
10 was shared that day.

11 **Q.** Ms. Driver-Linn, if you could, turn to page 203 in your
12 deposition. I've blown it up on the screen so you can see
13 it.

14 "QUESTION: Did you take any steps after the
15 meeting on February 25 to correct anything in this report?

16 "ANSWER: Not that I recall."

17 Were you asked that question and did you give that
18 answer at your deposition?

19 **A.** Yes.

20 **Q.** And you don't recall anyone from admissions asking you to
21 dig deeper into the issue of whether there was a bias in
22 Harvard's admissions process against Asian-Americans, right?

23 **A.** I don't recall that.

24 **Q.** So now we've gotten through the end of February 2013.
25 Let's fast-forward a month to April 2013. I'm going to show

1 you P604. You see this is an email from someone named
2 Christine Heenan to you, right?

3 **A.** I do see that.

4 **Q.** And this was sent to you on April 29, 2013?

5 **A.** Yes.

6 MS. HACKER: SFFA offers P604.

7 MS. ELLSWORTH: No objection.

8 THE COURT: It's admitted.

9 (Plaintiff Exhibit No. P604 admitted.)

10 BY MS. HACKER:

11 **Q.** I'd like to start on the second page where the email
12 chain begins, and we can scroll down here to the bottom.
13 Ms. Heenan says to you -- sorry.

14 You say to Ms. Heenan, "Would like to give you a
15 heads-up about some analysis and correspondence we've been
16 having with Fitz."

17 Do you see that?

18 **A.** Yes.

19 **Q.** It goes on, "He's" -- and the "he" there is Dean
20 Fitzsimmons, right?

21 **A.** Yes.

22 **Q.** So, Dean Fitzsimmons -- "excited to share more broadly.
23 I believe is going to be in touch with Jeff Neal tomorrow,
24 but I'd like to make sure you've had a chance to think
25 through implications. Not entirely straightforward."

1 Do you see that?

2 **A.** I do.

3 **Q.** And when you're emailing Ms. Heenan here -- by the way,
4 Ms. Heenan, she's involved in media relations, right?

5 **A.** At that time I believe she was vice president for Harvard
6 public affairs and communications.

7 **Q.** So she dealt with media relations generally?

8 **A.** Among other things, yes.

9 **Q.** Now let's take a look at what Ms. Heenan says in response
10 to your email.

11 She asks, "Re Fitz, what is the issue?"

12 And if we go back to the first page and see how
13 this conversation continues, you respond to Ms. Heenan, "Fitz
14 asked us to do some analysis of thumb on the scale for low
15 income. Could be a positive message but has implications for
16 need-blind policy as well as opening the door to Unz-like
17 requests for info about other thumbs on the scale."

18 Do you see that?

19 **A.** Yes, I do.

20 **Q.** Then in the next sentence you say, "Team is putting
21 together a memo to send to Fitz, copy you and Jeff, to put
22 this in context."

23 And the team you're talking about there is OIR,
24 right?

25 **A.** Yes, I think so.

1 **Q.** Then Ms. Heenan asks you, "Thumbs on the scale meaning
2 extra weight we give to those students? If so, you are
3 right. There are upsides and downsides of being public about
4 that analysis."

5 Do you see that?

6 **A.** Yes, I do.

7 **Q.** You reached out to Harvard's media relations person,
8 Ms. Heenan, because you were concerned that there were
9 upsides and downsides of being public about admissions
10 decisions?

11 **A.** My sense of reaching out to Christine was that Dean
12 Fitzsimmons wanted to make a public statement and that it
13 would be good for her to know about that. And that when you
14 take admissions analysis and you look at it without the
15 context and without the nuance, it can get looked at
16 narrowly, and that could be problematic.

17 **Q.** So there are upsides and potentially downsides of it
18 being public?

19 **A.** Of it being looked at narrowly.

20 **Q.** So in this April 29 email, you say, "OIR is working on a
21 memo to share with Dean Fitzsimmons, among others."

22 You believe that you've reviewed drafts of that
23 memo as it was being created, right?

24 **A.** Yes, I do.

25 **Q.** So let's look at a draft together. And this is P24. Do

1 you have P24 in front of you?

2 **A.** Yes, I do.

3 **Q.** And this is a draft of the memo that you and some others
4 sent to Dean Fitzsimmons, right?

5 **A.** Yes.

6 **Q.** You agree that it's possible you wrote some portion of
7 this memo?

8 **A.** I do think it's possible.

9 **Q.** And at the very least, you reviewed it before it went to
10 Dean Fitzsimmons?

11 **A.** I think so.

12 **Q.** Because you were ultimately responsible at OIR?

13 **A.** That's correct.

14 MS. HACKER: Your Honor, SFFA offers P24.

15 MS. ELLSWORTH: No objection.

16 THE COURT: It's admitted.

17 (Plaintiff Exhibit No. P24 admitted.)

18 BY MS. HACKER:

19 **Q.** Now, we see in addition to Dean Fitzsimmons at the top,
20 this is also addressed to Jeff Neal and Christine Heenan.
21 They both are folks who deal with public relations for
22 Harvard?

23 **A.** They're both -- they were both at that time in public
24 relations in communications.

25 **Q.** We have Nina Collins. She's in the dean's office, right?

1 **A.** Yes.

2 **Q.** Then we have Sally Donahue. She was the financial aid
3 director at this time, right?

4 **A.** That's correct.

5 **Q.** So let's see what this says to Dean Fitzsimmons on page
6 3. I want to start with this chart here. Zoom in so we can
7 all see it.

8 Now, this chart shows us something called
9 coefficient estimates, right?

10 **A.** Yes.

11 **Q.** The higher the coefficient estimate means essentially a
12 stronger effect on someone's chances of admission?

13 **A.** This is the output of a regression analysis looking at
14 the probability of admissions. And the coefficient estimates
15 are looked at relative to one another in relationship to that
16 particular analysis.

17 **Q.** And because they're relative to one another, the higher
18 the estimate means a stronger effect on someone's chances of
19 admission?

20 **A.** This is really a modeling exercise. It's not speaking
21 directly to a chance for admission. But in this analysis,
22 you have a -- the probability of admission in this model, the
23 coefficient estimates, if they're higher, that it is a
24 stronger probability.

25 **Q.** And that probability could either be positive or

1 negative, right?

2 **A.** Yes.

3 **Q.** A positive relationship would indicate that a student is
4 more likely to be admitted?

5 **A.** Again, this is a sort of hypothetical modeling. It's not
6 speaking to the actual admissions process. But in this, if
7 it's a positive effect, it would be the probability is more
8 positive in this model. And negative, it would be negative.

9 **Q.** In this model, to be clear, negative means there's a
10 negative. A student is less likely to be admitted to
11 Harvard, right?

12 **A.** I just don't feel comfortable with the movement from this
13 model to the probability of getting admitted in the class
14 because it is a hypothetical.

15 **Q.** But you understand that a negative in this model shows a
16 negative relationship between that variable and the chance of
17 a student's admission to Harvard, right?

18 **A.** Yes, in this model.

19 **Q.** And according to this model, if we look down here at the
20 bottom, there's a negative effect of being Asian on an
21 applicant's chance of admission, right?

22 **A.** The coefficient estimate is negative .37.

23 **Q.** And that means an applicant's chance of admission is
24 lower because of being Asian-American, right?

25 **A.** I just -- the leap to an applicant's chance is lower in

1 this model, yes.

2 **Q.** And then if we look at the text above this chart, let's
3 zoom in on that. We see the same thing reflected in the
4 text. On the flip side, we see a negative effect for Asian
5 applicants.

6 Do you see that?

7 **A.** I see that sentence, yes.

8 **Q.** And then it goes on to say, "These realities have also
9 received intense scrutiny from critics like Bowen or more
10 recently Unz, as we have discussed at length."

11 Do you see that?

12 **A.** I do.

13 **Q.** And you believe the reference to discussions at length
14 refers to the February 2013 meeting with Dean Fitzsimmons,
15 right?

16 **A.** I'm not sure.

17 **Q.** Well, let's see if we can refresh your recollection.
18 Turn to page 252 with me in your deposition, and read to
19 yourself lines 5 through 13. Let me know when you've
20 finished.

21 **A.** (Witness reviews document.) I'm finished.

22 **Q.** So you believe that the conversations being referred to
23 having been discussed at length, you expect that references
24 the meeting in February with Dean Fitzsimmons, right?

25 **A.** Yes, I see the line here.

1 Q. And whoever wrote this sentence described the negative
2 effect for Asian-American applicants as a reality?

3 A. I'm sorry. Could you point out what you're referring to?

4 Q. You see this, "These realities"?

5 A. Yes. Yes, I do.

6 Q. And then this continues, "To draw attention to the
7 positive benefit that low-income students receive may also
8 draw attention to the more controversial findings around
9 Asians."

10 Do you see that?

11 A. Yes.

12 Q. That was a concern that you had?

13 A. I don't remember having that concern.

14 Q. Ms. Driver-Linn, let's look at your deposition page 253.
15 And I'd like for us to look at lines 8 through 19 together.

16 "QUESTION: It goes on to say to, 'To draw
17 attention to the positive benefit that low-income students
18 receive may also draw attention to the more controversial
19 findings around Asians or the expected results around legacy
20 and athletes.' Did I read that correctly?

21 "ANSWER: Yes.

22 "QUESTION: Was that a concern you had?

23 "ANSWER: Based on the preparation for today's
24 deposition, I do believe it was a concern I had."

25 Were you asked those questions and did you give

1 those answers?

2 **A.** I do. And it goes on to say that I was referring to the
3 Christine Heenan email as a way to --

4 **Q.** Referring to your concerns about these issues?

5 **A.** Yeah. I think my sense of this is that in the deposition
6 exchange I was thinking back to the Christine Heenan email
7 and thinking of it being a concern that I had raised with
8 her.

9 **Q.** Focusing back on this memo, P24, you didn't say anywhere
10 in here that the analysis is unreliable, did you?

11 **A.** No. In this draft memo, I don't remember saying that.

12 **Q.** You didn't warn Dean Fitzsimmons in this memo that what
13 was sent to him, OIR's analysis, was inaccurate?

14 **A.** I don't recall that in this draft or the other drafts.

15 **Q.** Instead, you wrote about the concerns of negative effects
16 on Asian-American applicants and your concern about them
17 getting publicized?

18 **A.** I'm sorry. Could you repeat the question?

19 **Q.** Instead of writing about how OIR's analysis might be
20 inaccurate, you wrote about the concerns of negative effects
21 on Asian-American applicants getting publicized?

22 **A.** I don't think these memos talk about the concern. I
23 think the concern was in the previous email.

24 **Q.** You don't remember looking at page 3 right here and
25 talking about these concerns about drawing attention to the

1 more controversial findings around Asians?

2 **A.** I just don't see the word "concern" there.

3 **Q.** So after sending this memo to Dean Fitzsimmons, you don't
4 recall him expressing any concerns about the findings in this
5 memo regarding Asian-Americans and Harvard's admissions
6 process, do you?

7 **A.** I don't think this is a memo that went to Dean
8 Fitzsimmons.

9 **Q.** Let's look at the final memo that's P26. It's already in
10 evidence.

11 Do you see that this is an email from Ms. Bever to
12 Dean Fitzsimmons?

13 **A.** Yes.

14 **Q.** And you see the memo is included there as an attachment?

15 **A.** It's an edited version of the draft we were looking at.

16 **Q.** After sending this final memo, P26, to Dean Fitzsimmons,
17 you don't recall him expressing any concern about the
18 findings in this memo regarding Asian-Americans and Harvard's
19 admissions process?

20 **A.** No, I don't.

21 **Q.** You don't recall Dean Fitzsimmons raising any criticisms
22 about the implications of OIR's analysis with respect to
23 being Asian and how it was negatively associated with
24 admissions outcomes?

25 **A.** I don't recall any criticisms.

1 **Q.** And you don't remember any requests for further follow-up
2 research on that particular question about the negative
3 effect on Asian applicants, right?

4 **A.** This memo was about low-income students, and there was a
5 follow-up request related to low-income students, low-income
6 analysis.

7 **Q.** But there was no follow-up request on the particular
8 question about the negative effect on Asian applicants,
9 right?

10 **A.** There was not a follow-up question. That was not the
11 subject of this analysis.

12 **Q.** I understand that you believe that was not the subject of
13 this analysis. But what my question is, is directed not on
14 the low-income analysis.

15 But you don't remember any requests for further
16 follow-up about the question of the negative effect on
17 Asian-American applicants after this memo was sent to Dean
18 Fitzsimmons?

19 MS. ELLSWORTH: Your Honor, I object. I think this
20 question has been asked and answered about two or three times
21 now.

22 THE COURT: I'll let her have it. I'm sure it's
23 been asked. I'm not totally sure it's been answered.

24 THE WITNESS: I'm sorry. Could you repeat it?

25 BY MS. HACKER:

1 **Q.** Of course. You don't remember any requests for further
2 follow-up research on the particular question about the
3 negative effect on Asian applicants, right?

4 **A.** I don't recall a request for that particular question.

5 MS. HACKER: Pass the witness.

6 MS. ELLSWORTH: Your Honor, what time to you need
7 to break?

8 THE COURT: Five of 12:00.

9 MS. ELLSWORTH: Five of? Okay.

10 EXAMINATION

11 BY MS. ELLSWORTH:

12 **Q.** Good morning, Ms. Driver-Linn.

13 **A.** Good morning.

14 **Q.** Ms. Hacker was just asking you about a question of the
15 negative effect of Asian-American ethnicity on admission. Do
16 you recall that phrasing?

17 **A.** Yes, I do.

18 **Q.** Is that the question that the low-income memo, Exhibit
19 P26, was attempting to address?

20 **A.** No, it is not.

21 **Q.** What was the subject of the P -- Exhibit P26 memorandum?

22 **A.** The -- whether or not low-income students, we had any
23 evidence of highly rated low-income students having a tip in
24 the admissions process.

25 **Q.** And that was a question Dean Fitzsimmons had asked OIR to

1 look into?

2 **A.** Yes.

3 **Q.** And that was the question you answered in the P26?

4 **A.** That is correct.

5 **Q.** You testified that Dean Fitzsimmons did ask for follow up
6 on the subject matter of that memorandum, the low-income
7 analysis, right?

8 **A.** Yes, he did.

9 **Q.** And what did he ask OIR to follow up on?

10 **A.** He asked to follow up on whether or not there was an
11 interaction between low income and Asian ethnicity.

12 **Q.** And did OIR conduct that follow-up work?

13 **A.** Yes, it did.

14 **Q.** And what did OIR conclude?

15 **A.** OIR, I don't know that we would say concluded, but we
16 looked at the relationship between low income and other kinds
17 of ethnicities, and we saw that low-income Asian students did
18 receive a positive tip toward the probability of admission.

19 **Q.** And were the results of that analysis passed on to Dean
20 Fitzsimmons?

21 **A.** Yes.

22 **Q.** Ms. Hacker was asking you several questions about whether
23 the work that you performed at OIR you considered it to be
24 reliable. Do you recall that?

25 **A.** Yes.

1 **Q.** She asked whether you considered it to be complete or
2 correct. Do you recall that?

3 **A.** Correct, yes. I'm not sure about complete.

4 **Q.** You recall her asking you whether OIR's work was
5 generally correct when it was passed along, right?

6 **A.** Yes.

7 **Q.** And do you agree that OIR tried to do correct work when
8 you were the leader of the office?

9 **A.** I think the office tried to do the best work it could
10 under time pressures, data limitations. We always tried to
11 do our best.

12 **Q.** And OIR always tried to do reliable work as well, right?

13 **A.** Yes.

14 **Q.** Can work be correct and reliable and still be
15 preliminary?

16 **A.** Yes.

17 **Q.** Could OIR's work be correct and reliable and still be
18 preliminary?

19 **A.** Yes.

20 **Q.** Could OIR's work be correct and reliable and still be
21 limited?

22 **A.** Yes.

23 **Q.** And what are some of the limitations to the work that OIR
24 is able to do, in a general sense?

25 **A.** Data completeness, data quality, the other kind of work

1 that might be going on in the office. I think also we could
2 do analytic work that didn't take into account the kind of
3 subject matter expertise of what it might be we were looking
4 at.

5 **Q.** Is that how you would characterize the work that was in
6 Exhibit P26?

7 **A.** Yes, I think that's fair.

8 **Q.** And is that how you would characterize the work that's in
9 Exhibit P12 that Ms. Hacker showed you briefly?

10 **A.** I'm sorry. P12 is the --

11 **Q.** Actually, Ms. Hacker may not have shown you P12, so let's
12 take a look at it. It is in your binder at Tab 1. Do you
13 have P12 in front of you?

14 **A.** I do.

15 **Q.** Do you recall discussing with Ms. Hacker a meeting in
16 February of 2013 with Dean Fitzsimmons?

17 **A.** Yes.

18 **Q.** And what prompted that meeting?

19 **A.** I think I reached out to Dean Fitzsimmons and asked for a
20 meeting.

21 **Q.** And is Exhibit P12 a version of the slide deck that was
22 shown at that meeting?

23 **A.** Yes.

24 **Q.** Ms. Hacker asked you about Exhibit P9. Do you recall
25 that?

1 **A.** Yes.

2 **Q.** And could you take a look, please, at Exhibit P9, which
3 is in your binder at Tab 2?

4 **A.** I see it.

5 **Q.** Were you involved in creating Exhibit P9?

6 **A.** No.

7 **Q.** Do you recall reviewing Exhibit P9 in or around January
8 of 2013?

9 **A.** No.

10 **Q.** Have you reviewed it since then?

11 **A.** Yes.

12 **Q.** Have you reviewed it outside of the context of this case?

13 **A.** No.

14 **Q.** Was P9 ever shared outside of the office of institutional
15 research?

16 **A.** Not to my knowledge.

17 **Q.** Did OIR ever show Exhibit P9 to Dean Fitzsimmons?

18 **A.** No.

19 **Q.** How do you know that?

20 **A.** I know that we showed P12 to him during that February 25
21 meeting, and there's just no record of P9 being shown to
22 anyone outside of the office, and I have no memory of it.

23 **Q.** Are there other aspects of Exhibit P9 that contribute to
24 your conclusion it was not shown outside of the office of
25 institutional research?

1 **A.** Yes.

2 **Q.** And what are those?

3 **A.** It's just so preliminary in the formatting. It's the --
4 you know, the title is off. Some of these exhibits have the
5 data flipped. There's pages that are blank. It seems to me
6 to be a very -- like an internal document of people working
7 out what they were looking at.

8 **Q.** So let's take a look at some of those pages. We have the
9 title page up on the screen. You've already responded in
10 response to Ms. Hacker's questions that the title of this
11 exhibit is Admissions Part II subtitle. Do you recall that?

12 **A.** Yes.

13 **Q.** And is that the type of title of a work product that
14 would have been shared outside of the office of institutional
15 research?

16 **A.** No.

17 **Q.** Why not?

18 **A.** Even though we would maybe not get things perfect, the
19 typical -- even with -- even with people we might meet with
20 to have working meetings would be to have had someone check
21 and complete things like the title, not have blank pages.

22 **Q.** And the date on this document, is that the correct date?

23 **A.** No.

24 **Q.** You testified earlier that it's a 2013 document, not a
25 2012, right?

1 **A.** That's correct.

2 **Q.** Take a look at Slide 3 of Exhibit P9, please, and focus
3 in particular on the chart at the bottom of the page, if you
4 could.

5 Do the labels on this chart accurately reflect the
6 data shown in the graph?

7 **A.** They do not. The graphic doesn't match with the table
8 below.

9 **Q.** Did OIR have a practice for how to check the accuracy of
10 work before it was finalized?

11 **A.** Typically a member of a team who might put together
12 something like this might ask for other members of the team
13 to review and help catch errors. But even that -- I don't
14 think this would have been gotten -- I don't even think this
15 would have gotten to that stage of having someone double
16 check it. I think someone who created this would have caught
17 these errors before sharing it.

18 **Q.** And to the extent that work had been checked, would it
19 have errors like this with the data being mislabeled?

20 **A.** I don't think so.

21 **Q.** You mentioned some blank slides in this presentation.
22 Can you look please at Slides 13 and 14.

23 Are those the blank slides you were referring to?

24 **A.** Yes.

25 **Q.** Take a look back, please, at Slide 5 of Exhibit P9. You

1 discussed this with Ms. Hacker.

2 Does Slide 5 show the output from a model of any
3 sort?

4 **A.** I don't think so.

5 **Q.** Is there any logistic regression analysis going on in
6 Slide 5?

7 **A.** No.

8 **Q.** Is Slide 5 descriptive statistics?

9 **A.** Yes, I believe so.

10 **Q.** And you pointed out, when Ms. Hacker was questioning you
11 about this slide, some labels on the bottom. Do you recall
12 that?

13 **A.** Yes, I do.

14 **Q.** And what was the -- what does the second bullet at the
15 bottom of Slide 5 say?

16 **A.** "OIR doesn't have all ratings for all years, so number of
17 applicants differs for each rating test score."

18 **Q.** Do you recall ever reviewing Slide 5 when you worked in
19 the office of institutional research?

20 **A.** No.

21 **Q.** Do you recall reviewing Slide 5 in 2013?

22 **A.** No.

23 **Q.** When is the first time you remember --

24 THE COURT: P12 went to the dean, though?

25 THE WITNESS: P12, yes, Your Honor.

1 THE COURT: Okay.

2 BY MS. ELLSWORTH:

3 Q. Why don't we turn to P12 right now. It is Tab 1 in your
4 binder. And in particular, can you look at the slides
5 beginning on 31.

6 A. I'm there.

7 Q. Actually, let's look at 32, please. Does this describe
8 the analysis that's being shown in Exhibit P12?

9 A. This is a methods page describing the subsequent models.

10 Q. And can you describe what the models that are shown on
11 the subsequent pages were attempting to do?

12 A. Yes. They were attempting to -- in a highly simplified
13 way try to look at whether we understood the admissions
14 process by doing a series of logistic regressions that would
15 be a modeling exercise to kind of look at the probability of
16 admissions with very limited factors, sort of one at a time,
17 to see whether or not we understood the admissions process in
18 a simplified way.

19 Q. Let's take a look at Slide 34, which has the output from
20 the model.

21 MS. ELLSWORTH: And can we zoom in on that a
22 little, please, Mr. Lee?

23 Q. Do the models on Slide 34 measure the effect of any
24 particular factor on an applicant 's chance of admission?

25 A. No.

1 **Q.** Do the models on Slide 34 show the effect of any tip in
2 the Harvard's admission process?

3 **A.** No.

4 **Q.** Do the models that are shown on Slide 34 reflect a
5 hypothetical admitted student pool?

6 **A.** Models 1 through 4 are a simulation, and it's not meant
7 to actually be an analysis of a tip or anything. The -- I'm
8 sorry.

9 **Q.** If we can go back a slide to Slide 33, which describes
10 the inputs for the models, and looking first at Model 1, can
11 you explain, please, how Model 1 operates in the context of
12 this logistical regression?

13 **A.** What I think was done here is you took the pooled set of
14 applicants for the years that were being looked at. And in
15 Model 1, you look just at those two variables, academic
16 index, academic rating, and you do a logistic regression to
17 get the probabilities of admission just with those two
18 variables and then take an arbitrary cutoff of 2,100
19 applicants that had the highest probability in this
20 simulation.

21 And then in the graphic on page 34, it would be
22 taking the output of that 2,100 -- the 2,100 with the highest
23 probability and saying what was the race ethnicity breakdown
24 of them.

25 MS. ELLSWORTH: Your Honor, I know we have

1 questions on these slides, but I do see it's five of. We can
2 resume after the break.

3 THE COURT: I would like to resume at quarter of
4 1:00. It might be a little ambitious, so head for quarter of
5 1:00 but walk slowly. Okay?

6 (Recess taken 11:55 a.m.)
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1 *** AFTERNOON SESSION ***

2 THE COURT: Whenever you're ready, Ms. Ellsworth.

3 MS. ELLSWORTH: Thank you, Your Honor.

4 BY MS. ELLSWORTH:

5 Q. Ms. Driver-Linn, can you turn to Tab 11 in your binder,
6 please. Do you have in front of you Exhibit P13?

7 A. Yes, I do.

8 Q. What do you recognize Exhibit P13 to be?

9 A. A version of the presentation that we were looking at
10 before. I believe it was P12.

11 Q. Is this a version of the presentation that was shown to
12 Dean Fitzsimmons in February of 2013?

13 A. Yes.

14 Q. Does this version have your handwritten notes on it?

15 A. Yes, it does.

16 MS. ELLSWORTH: Your Honor, I'd move to admit P13.

17 MS. HACKER: No objections.

18 (Plaintiff Exhibit No. P13 admitted.)

19 BY MS. ELLSWORTH:

20 Q. You can put that to the side, Ms. Driver-Linn. We were
21 talking about Exhibit P12 before we broke for lunch. I'd
22 like you to open your binder to Exhibit P12, which is Tab 1,
23 and look back at Exhibit P9, which is what Ms. Hacker was
24 discussing with you this morning. So keep your binder open
25 and we'll put P9 up on the screen. And we'll just do P9.

1 Thank you.

2 Do you know who created Exhibit P9?

3 **A.** I believe Mark Hansen.

4 **Q.** Do you know why Mr. Hansen created this document?

5 **A.** I think he was interested in learning more about
6 modelling statistics. Prior to this particular era in the
7 office, he had been more involved in kind of data collection,
8 data architecture, and he was teaching himself a lot of
9 things about statistics and additional kinds of analytic
10 techniques. And I believe he did it because he was aware of
11 the kind of Unz-like issues that had been discussed.

12 **Q.** If we can look at Slide 5 of Exhibit P9. You can keep
13 P12 open in front of you. We'll keep 5 on the screen. You
14 recall discussing this slide with Ms. Hacker?

15 **A.** Yes.

16 **Q.** Does Slide 5 show the output of a logistic regression
17 model?

18 **A.** No.

19 **Q.** Does Slide 5 show what you would term descriptive
20 statistics?

21 **A.** Yes.

22 **Q.** What is the difference between descriptive statistics and
23 logistic regression?

24 **A.** A descriptive statistic tends to be just showing a
25 number, an average, or a trend. Logistic regression is a

1 technique, a modelling technique where you output a number of
2 different variables in using this technique, look at them
3 relative to one another and the outcome.

4 **Q.** Slide 5 that's shown here does not show the output of the
5 model like the one you just described, right?

6 **A.** I don't think so.

7 **Q.** Looking at the version of P12 or P12 which you have in
8 your binder, is Slide 5 from Exhibit Plaintiff's 9, does that
9 appear anywhere in P12?

10 **A.** No.

11 **Q.** Turn, if you would, please, to Slides 8 and 9 of
12 Exhibit P9. Do you recall seeing Slides 8 and 9 in
13 Exhibit 13?

14 **A.** No.

15 **Q.** Are Slides 8 and 9 of Exhibit P9 contained within P12,
16 the version shown to Dean Fitzsimmons?

17 **A.** No.

18 **Q.** Had you seen Slides 8 or 9 of Exhibit P9 prior to your
19 deposition in this case? I'll withdraw the question to make
20 it clear.

21 Prior to this litigation?

22 **A.** No.

23 **Q.** What is your reaction to the information on Slides 8 and
24 9 in Exhibit P9?

25 **A.** I think that Mark was using these in an exploratory way

1 to try to understand the relationship of variables with one
2 another, kind of as an understanding the data. And I find
3 them, in terms of an analysis that you would look at to try
4 to interpret, very difficult to interpret.

5 THE COURT: What do the class years on there mean?

6 THE WITNESS: I believe that they are the variables
7 that represent the students in this applicant pool that were
8 applying for that class year.

9 And, Your Honor, this is one of the reasons I find
10 this confusing as output to try to determine is that it's
11 difficult to imagine that you're looking at the class of 2012
12 and saying you're more likely to get in if you're in the
13 class of 2012 than these other years. They're not the same
14 as the other kinds of variables.

15 BY MS. ELLSWORTH:

16 **Q.** Ms. Driver-Linn, looking at the information shown on
17 Slides 8 and 9 in Exhibit P9, does the information in those
18 slides show any discrimination against Asian-Americans in the
19 Harvard College admissions process?

20 **A.** No. These exploratory models are looking at data, a kind
21 of data set, and trying to understand the variables in
22 relationship to one another. They are not meant to show
23 anything about the admissions process.

24 MR. LEE: Your Honor, we've lost the realtime.

25 (Off the record.)

1 BY MS. ELLSWORTH:

2 Q. Ms. Driver-Linn, which slides in Exhibit P9 are included
3 in Exhibit P12, which is the version that was shown to Dean
4 Fitzsimmons? And I'll have Mr. Lee flip through them on the
5 screen.

6 A. A version of this but not this exact.

7 Q. Of Slide 10?

8 A. Slide 10.

9 Q. Let's look at Slide 11, please.

10 A. A version of this but not this exact exhibit.

11 Q. And Slide 12?

12 A. A version of this but not this exact exhibit.

13 Q. And what's the next slide, Slide 13?

14 A. No.

15 Q. Slide 14?

16 A. No.

17 Q. Slide 15?

18 A. No.

19 Q. Slide 16?

20 A. No.

21 Q. Slide 17?

22 A. No.

23 Q. Slide 18?

24 A. Some of the same information on Slide 17 might be. I
25 don't remember.

1 **Q.** Slide 18? Is that the last slide? Okay.

2 How would you describe the information in
3 Exhibit P9?

4 **A.** I think it's exploratory, trying to work out what the
5 analyst was exploring and trying to see.

6 **Q.** So I'm going to turn our attention back to Exhibit P12.
7 Before I ask you any more questions about that exhibit,
8 though, I'd like to just understand a little built more about
9 the Office of Institutional Research.

10 Does OIR receive requests for analysis from outside
11 of the office?

12 **A.** Yes.

13 **Q.** And from whom does OIR receive requests?

14 **A.** The office receives requests from people across the
15 university and outside of the university.

16 **Q.** And does OIR ever initiate an analysis on its own?

17 **A.** Yes.

18 **Q.** Under what circumstances?

19 **A.** Often we would do an analysis or do analytic work when we
20 knew that the university was going to be needing that kind of
21 work.

22 For example, when we knew that the institution was
23 going to be experiencing the comprehensive accreditation
24 visit, the office decided to do work related to student
25 outcomes across the university, knowing that that work would

1 need to be looked at.

2 **Q.** And are there times when OIR initiates analysis on its
3 own that are different from the circumstance you just
4 described?

5 **A.** Yes.

6 **Q.** And what are some examples of that?

7 **A.** Well, we would do additional work if we had the capacity
8 in the office to explore our understanding of particular data
9 sets. We would do work -- mostly it would be imagining that
10 someone in the university would need it at some point.

11 **Q.** In your time as the director of OIR, did you ever count
12 or track the number of separate analyses being conducted at
13 OIR in a given period?

14 **A.** We did at one time. I asked the team to keep track of
15 the number of requests we got. We call them ad hoc requests.
16 And in that year, we had 750 requests.

17 **Q.** At any given time during the time that you led the
18 office, how many ongoing projects did OIR have?

19 **A.** A typical sort of project list would include 30 or so
20 projects of different sizes and lengths in time.

21 **Q.** Could you describe the approach that OIR takes to its
22 analytic work?

23 **A.** We often describe our work as always iterative, always
24 trying to refine. We would explore questions from multiple
25 angles, trying to look at it from different points of view.

1 We often would approach our work by scoping out
2 questions and then inviting what we would call content
3 experts or subject-matter experts to talk with us so that we
4 would understand the background of what we were trying to
5 look at, ask them more questions.

6 **Q.** Who outside OIR might you consult with as a content
7 expert, as you just mentioned?

8 **A.** Many people would typically be those on the ground who
9 had some expertise. So for example, if we were doing a
10 project related to the staff across the university, we would
11 ask members of HR, who understood the full sort of work force
12 data, to come and talk with us.

13 **Q.** Who would be the context experts in connection with work
14 being doing relating to Harvard College admissions data?

15 **A.** Dean Fitzsimmons, Dean Donahue. We had Janet Irons, I
16 believe, someone who deeply understood the financial aid
17 data. We might consider someone like Elizabeth Yong, a
18 content expert, but much less about the process, much more
19 about understanding the data.

20 **Q.** At what point in the analytic process would you typically
21 consult with people outside of OIR?

22 **A.** Usually multiple points. We might early in a process, as
23 I was just mentioning, and then periodically as we were
24 iterating to get their feedback on what we would be doing.

25 **Q.** So let's focus again on P12 and in particular Slide 5 of

1 Exhibit P12, please. What does Slide 5 show?

2 **A.** It's a kind of outline. It's entitled "Part 1 Access,"
3 and it has the three sort of chapters in this set of
4 exhibits.

5 **Q.** Does Slide 5 show all three topics that were discussed
6 with Dean Fitzsimmons at the February 2013 meeting?

7 **A.** Yes.

8 **Q.** Focusing just first on the first topic, who requested the
9 analysis that OIR performed relating to the return to early
10 action?

11 **A.** I think of this one as -- we would have always known that
12 we wanted to come back to that. We had done some earlier
13 work on early action. And then as the policy was reinstated,
14 that we would want to look at the data again. We may have
15 discussed it as a request from Dean Fitzsimmons and others,
16 but I think the team imagined we would be doing this, and we
17 might not have actually gotten a question.

18 **Q.** What is the second topic on Slide 5 of P12?

19 **A.** Shift in the gender balance and impact of concentration
20 choice.

21 **Q.** Who requested the analysis on gender balance and
22 concentration choice?

23 **A.** Dean Fitzsimmons.

24 **Q.** And what's the third topic?

25 **A.** Evaluating factors that play a role in Harvard College

1 admission.

2 **Q.** Who requested the work on evaluating factors that play a
3 role?

4 **A.** No one.

5 **Q.** What is the origin of the evaluating factors analysis?

6 **A.** Mark Hansen did this work, and we brought it forward to
7 discuss it with Dean Fitzsimmons.

8 **Q.** Do you recall discussing earlier in response to some
9 questions from Ms. Hacker the entries on Harvard's privilege
10 log relating to Mr. Unz's article?

11 **A.** Yes, I do.

12 **Q.** Did OIR conduct an analysis at the direction of Harvard's
13 counsel that arose out of those privilege log entries?

14 **A.** Yes.

15 **Q.** Is that the analysis shown in Exhibit P12?

16 **A.** No.

17 **Q.** Was the analysis contained in Exhibit P12 concerning
18 evaluating factors that play a role in Harvard College
19 admission part of an investigation into discrimination
20 against Asian-American applicants?

21 **A.** No.

22 **Q.** Were all three topics shown on Slide 5 discussed at the
23 meeting with Dean Fitzsimmons?

24 **A.** To the best of my understanding, yes.

25 **Q.** Let's take a look at the evaluating factors portion of

1 this deck, and Slide 32 in particular, please. The last
2 bullet point on Slide 32 says, "The following analysis is
3 preliminary and for discussion."

4 Do you see that?

5 **A.** I do.

6 **Q.** And "preliminary" is bolded and underlined?

7 **A.** Yes.

8 **Q.** Does that underlining and bolding signify anything it?

9 **A.** I think we meant to convey that it was very preliminary,
10 as we were getting ready to show this to the content experts.

11 **Q.** And why did OIR want to convey the fact that this
12 analysis was very preliminary in this deck?

13 **A.** I believe because we understood that it was a highly
14 simplified version of the way that someone who was a content
15 expert like Dean Fitzsimmons and others would think about
16 their admissions process.

17 **Q.** Why did you share your work with Dean Fitzsimmons at this
18 stage of the analysis?

19 **A.** I think we wanted to get his feedback, and I think we
20 wanted to see if we could ask about further variables that we
21 could look at and see if there were other ways of thinking
22 about the process that we could use.

23 **Q.** Look, please, at the second bullet under "Strategy" on
24 this Slide 32, beginning with "Generate." Could you please
25 read that?

1 **A.** "Generate fitted probabilities of admissions. Given an
2 applicant's characteristics, how likely are they to be
3 admitted (0 or 1)?"

4 **Q.** And can you describe how OIR constructed the model to
5 generate these fitted probabilities of admissions?

6 **A.** I think the way that this was done was to take this pool
7 of data from 2007 to 2016 and step by step in these models
8 look at just those variables that are listed and generate the
9 probabilities.

10 And then, as I was saying earlier, taking a kind of
11 arbitrary 2,100 and designating those applicants that had the
12 highest probabilities in that 2,100 up and then looking at
13 the demographics of those.

14 Some of those in this modelling exercise may have
15 actually been admitted, and many of them may not have been
16 admitted.

17 THE COURT: How do you get the 2,100?

18 THE WITNESS: I think that the reason for the 2,100
19 cutoff would have been --

20 THE COURT: No, not the cut off, but how do you
21 identify the 2,100?

22 THE WITNESS: Oh. I believe that as you did the
23 logistic regression and you got the probability, you take the
24 highest probability 2,100 and above.

25 BY MS. ELLSWORTH:

1 **Q.** We talked before the break about how that would have
2 worked in the context of Model 1. So if you can look at
3 Slide 33 which has the inputs to the model. Are you there?

4 **A.** Yes.

5 **Q.** To the models, I should say. In connection with Model 2,
6 what are the factors of the variables that were included?

7 **A.** Academic index, academic rating, legacy, athlete.

8 **Q.** How did the model that you just described operate in the
9 context of Model 2?

10 **A.** The same as I just described. But the variables that
11 would be used to fit the probabilities would include all four
12 of those as opposed to just the two in the prior model.

13 **Q.** And then looking at Slide 34, which has the bar charts,
14 and particularly focusing on Model 2, what is Model 2 showing
15 in terms of -- what is Slide 34 showing in terms of the
16 results of Model 2?

17 **A.** You take that hypothetical, the highest probability is
18 the 2,100, and then look at what were the race/ethnicities of
19 those in that 2,100 and look at the percentages.

20 **Q.** And the percentage is broken down by ethnic group,
21 correct?

22 **A.** Correct.

23 **Q.** And looking back at Slide 33 for Model 3, would you add
24 in these two additional ratings into the modelling process?

25 **A.** Yes.

1 **Q.** And so can you once again describe how Model 3 works in
2 the context of this particular regression analysis?

3 **A.** So you'd do the same modelling exercise, add in those
4 additional variables, and then again get the probabilities
5 and take the top 2,100. And then in the next page show the
6 racial ethnicity, the race and ethnicity of those that were
7 in that 2,100.

8 **Q.** Back to Slide 33, please. And focusing again on Model 3
9 which you were just discussing, does Model 3 show the effect
10 of any of those six factors on the probability of admission
11 to Harvard College?

12 **A.** No. And we don't see the coefficients or any one of
13 these -- any one of these variables in these exhibits.

14 **Q.** You've mentioned that the models create a hypothetical
15 admitted class. Do I have that right?

16 **A.** That's correct.

17 **Q.** And can you please just explain what that means, a
18 hypothetical admitted class.

19 **A.** So we're fitting these probabilities as a kind of
20 simulation. And then you take this cutoff of 2,100 and look
21 above, but it's not necessarily the actual students that were
22 admitted.

23 **Q.** And so does it mean that there are students who may have
24 had other factors that contributed to their admission to
25 Harvard that are not measured by these models and that the

1 impact of those factors is not demonstrated in these models?

2 **A.** Definitely these are a very limited number of factors.

3 **Q.** Are there more factors that are considered in the Harvard
4 admissions process than the factors included in Model 4,
5 which is the model that includes the highest number of
6 factors in this exercise?

7 **A.** Many more.

8 **Q.** Does the modelling exercise shown on Slides 33 and 34
9 take into account any impact of socioeconomic status on
10 Harvard College admissions?

11 **A.** No.

12 **Q.** And when you say that there are different individuals who
13 may have been actually admitted than are shown in these
14 models, does the identity of the individuals who may have
15 been admitted, would that be impacted by the way in which
16 Harvard College considers or weights factors for admission?

17 **A.** I'm sorry. Could you repeat that again?

18 **Q.** Sure. The fact that there are -- there's a difference
19 between those who are actually admitted and those shown in
20 the results of Model 4. What contributes to that difference?

21 **A.** It could be any number of things. I mean, many different
22 things could have contributed to the way that the actual
23 admissions process works. Here, we're just looking at with
24 this limited number of variables can we get to a kind of
25 demographic -- not demographic, but race/ethnicity background

1 that is close to the actual admitted classes.

2 **Q.** And in Model 4, the gender and ethnicity of applicants is
3 included in the modelling process, correct?

4 **A.** Yes.

5 **Q.** And does inclusion of the gender and ethnicity of the
6 applicants in Model 4 contribute to the fact that Model 4 is
7 the closest approximation of the gender and ethnic breakdown
8 of the actual admitted class?

9 **A.** Yes.

10 **Q.** Do the models on Slides 33 and 34 show the effect of any
11 particular tip that may be given in Harvard's admissions
12 process?

13 **A.** No.

14 **Q.** And even as to the eight factors that are showing on
15 Slide 33, do the models on Slides 33 and 34 show the effect
16 of any one of those factors on or around admissions outcomes?

17 **A.** No. They don't show this year.

18 THE COURT: Are you saying is it a coincidence that
19 Model 4 and actual are the same, or are you saying that
20 you're trying to build a model that approximates actual?

21 THE WITNESS: Your Honor, I don't think it's a
22 coincidence. I think we were trying to model something to
23 see if we could get as close as we could to the actual.

24 BY MS. ELLSWORTH:

25 **Q.** And can you explain why you were trying to do that?

1 **A.** To understand the -- to understand the admissions process
2 and to understand the way that these different variables may
3 as a whole contribute to the probability of admission.

4 **Q.** Why did you present the results of these models to Dean
5 Fitzsimmons in February of 2013?

6 **A.** To show him what we were doing and to get his input and
7 feedback and to ask questions about additional variables that
8 could be used in a modeling exercise like this.

9 **Q.** Do you recall testifying in response to Ms. Hacker's
10 question that OIR had, in fact, obtained some additional
11 information from admissions after attending this meeting with
12 Dean Fitzsimmons?

13 **A.** Yes.

14 **Q.** And was OIR able to work with the additional data that it
15 received?

16 **A.** I think we were able to use the additional data for
17 different strands of work for admissions and financial aid,
18 but I don't think we did anything more with these modeling
19 exercises.

20 **Q.** When you first saw the models contained on Slides 33 and
21 34 of Exhibit P12 in 2013, did you interpret them to show
22 evidence of bias or discrimination?

23 **A.** No.

24 **Q.** Did you tell Dean Fitzsimmons in 2013 that you thought
25 the modeling exercise on Slides 33 and 34 showed evidence of

1 bias or discrimination?

2 **A.** No.

3 **Q.** Do you interpret them today to show evidence of bias or
4 discrimination?

5 **A.** No.

6 **Q.** Why not?

7 **A.** They weren't designed to look for evidence of bias or
8 discrimination. They were trying to model in a highly
9 simplified way the admissions process so that we could
10 understand.

11 **Q.** Are you aware that both Harvard and SFFA have retained
12 experts to give testimony in this case?

13 **A.** Yes.

14 **Q.** And are you aware that both parties' experts conducted
15 statistical analyses of Harvard's admissions data?

16 **A.** Yes.

17 **Q.** Have you reviewed some of that analysis?

18 **A.** Yes, I have.

19 **Q.** How many factors did the experts include in their
20 analysis?

21 **A.** I didn't count them. Many, many more than are here.

22 **Q.** And what does that fact tell you about OIR's modelling
23 analysis on Exhibit P12?

24 MS. HACKER: Objection, Your Honor. This is
25 improper undisclosed expert opinion testimony.

1 MS. ELLSWORTH: Your Honor, I think the witness,
2 being the head of OIR at the time of these documents, which
3 have been the subject of extensive questioning from SFFA, is
4 entitled to provide some reactions to how they compare.

5 THE COURT: I'll give you some latitude on it. But
6 let me just interrupt you because I'm probably embarrassed to
7 be asking this question, because I'm sure I'm being thick
8 about this.

9 I don't understand. You pick 2,100 random people,
10 right? Hypothetical people, right?

11 THE WITNESS: No, Your Honor. Let me just say I
12 think these are very hard to understand.

13 THE COURT: You're being very kind.

14 THE WITNESS: What I believe is that you take the
15 full applicant pool from 2007 to 2016, and that's the kind of
16 data set. And in the data set, we know who was actually
17 admitted. But you use all the applicants and you kind of
18 leave aside knowing whether they were admitted or not. You
19 do a logistic regression to kind of understand the
20 probabilities of these individual factors and then draw a
21 cutoff line. Look at those probabilities and then show what
22 is the demographic -- or the race/ethnicity makeup of those
23 one by one as a modelling exercise. I don't know if that
24 answers your question.

25 THE COURT: It doesn't. I'm sure it does, but I

1 still can't understand it.

2 You have the actual class. You take a bunch of
3 variable that come up with the ones most likely to be
4 admitted, right? Is that what you're saying, that the
5 hypothetical class is the 2,100?

6 THE WITNESS: The 2100 would be the hypothetical.

7 THE COURT: Most likely to be admitted based on
8 what criteria?

9 THE WITNESS: On just those variables. So for
10 example, in Model 1 it would be the highest likelihood,
11 highest probability of admission just based on academic index
12 and academic rating. And that might be -- I'm sure it would
13 be a very different -- not very, but it would be a different
14 2,100 than the 2,100 after you add in legacy and athlete.

15 THE COURT: So it's not the same 2,100.

16 THE WITNESS: No. It would be different. You'd
17 get these different probabilities based on each of these
18 modelling exercises, draw the cutoff. And then on this
19 exhibit with Model 4, that particular exercise is shown right
20 next to the actual admitted students in that pool.

21 THE COURT: How does it come out that actual ends
22 up being -- so actual -- demographics is --

23 MS. ELLSWORTH: If you look at Slide 33, I think
24 that provides a little information. Maybe it would be
25 helpful, Your Honor, if I could have Ms. Driver-Linn try and

1 walk through an example using the model of how it was done.

2 THE COURT: That's fine. I guess I don't
3 understand how actual and the last model come out so close to
4 each other if you're dealing with a random 2,100,
5 hypothetical 2,100.

6 THE WITNESS: I don't think of them as random.
7 Once you put in the eight variables in this data set in
8 Model 4 and then you take that resulting 2,100 that is this
9 hypothetical and you look at their race/ethnicity breakdown,
10 the percentages mapped on pretty nicely to the actual.

11 And if you look at the difference between Model 3
12 and Model 4, the two variables that are being added in are
13 gender and ethnicity. So that made a difference to get it
14 closer to the actual.

15 THE COURT: I have to think about that.

16 BY MS. ELLSWORTH:

17 **Q.** Let me try this. Ms. Driver-Linn, let's take a look at
18 Model 3 and on Slide 33. What are the six factors that were
19 included in Model 3?

20 **A.** Academic index, academic rating, legacy, athlete,
21 personal rating, extracurricular rating.

22 **Q.** How did those -- how were those six variables used in
23 constructing the output of Model 3?

24 **A.** The variables would be included in the regression model.
25 You get an algorithm that creates the kind of probability.

1 The probabilities are used to then rank those in the pool --
2 not rank -- yeah, rank -- rank them in the pool and then take
3 that 2,100 and say let's now look at the race/ethnicity of
4 that arbitrary class.

5 **Q.** And so looking at the output from the model on Slide 34,
6 which takes those rank-ordered 2,100, right?

7 **A.** Yes.

8 **Q.** And it identifies the racial and ethnic breakdown of that
9 rank-order 2,100, right?

10 **A.** Yes.

11 **Q.** Could the output from Model 4 be shown using some
12 different breakdown? For example, any one of the variables
13 as opposed to ethnicity?

14 **A.** I'm sorry?

15 **Q.** Could the output of Model 3 be shown in a way that shows
16 those who have an academic rating of X, Y, or Z?

17 **A.** I don't know. The academic rating was used in all of
18 these models.

19 **Q.** So the depiction on Slide 34 is just showing those 2,100
20 schools cut along racial or ethnic lines, right? The 2,100
21 applicants. Excuse me.

22 **A.** Yes.

23 **Q.** So the 2,100 applicants could be cut on any other lines
24 that are available in the data, right, to show how that
25 makeup would have been?

1 **A.** Yes.

2 THE COURT: Why wouldn't you do that with the
3 actual admitted students?

4 THE WITNESS: That's what was done in that line
5 that says "actual."

6 THE COURT: Okay.

7 THE WITNESS: And then we compared with the model
8 that was hypothetical, Hypothetical 1 through 4.

9 THE COURT: The actual has all those other
10 variables built into it, too, or just the race and ethnicity?

11 THE WITNESS: Just race/ethnicity.

12 THE COURT: Couldn't you do this with taking the
13 actual instead of 2,100?

14 THE WITNESS: So this would take the students that
15 were actually admitted in those years and then look at the
16 race/ethnicity breakdown without looking at any of the
17 factors and how they might have been used. I guess as a
18 modelling exercise it's just trying to understand how these
19 particular simplified factors result in a class.

20 BY MS. ELLSWORTH:

21 **Q.** So the fact that the Model 4 output and the actual look
22 similar, they're similar in terms of racial breakdown,
23 correct?

24 **A.** Correct.

25 **Q.** Are there any other similarities that you can discern

1 between the results of Model 4 and the actual class from this
2 exercise?

3 **A.** From this exercise, you cannot.

4 **Q.** Could the applicants shown to be the highest probability
5 of admission in Model 4 be all male or all female, for
6 example?

7 **A.** Hypothetically they could.

8 **Q.** Could the applicants shown in the output of Model 4 be
9 all from a high socioeconomic status and not low
10 socioeconomic status?

11 **A.** They could.

12 **Q.** Could the applicants in the output of Model 4 be all from
13 the State of Montana?

14 **A.** I don't think so.

15 MR. HUGHES: Come on.

16 MR. WAXMAN: Counsel doesn't have enough kids yet.

17 BY MS. ELLSWORTH:

18 **Q.** Could the applicants from the output of Model 4 be all
19 from the Northeast?

20 **A.** Yes.

21 THE COURT: The first thing he said during the
22 entire week, you know.

23 MS. ELLSWORTH: Your Honor, do you have any more
24 questions about the slides?

25 THE COURT: Not that I'm willing to admit.

1 BY MS. ELLSWORTH:

2 Q. Let's look at Slide 36 of this exhibit. What is Slide 36
3 summarizing?

4 A. It's saying from this exercise, from this modelling
5 exercise, here's what we've learned. And then there's a
6 variety of factors that are missing or that ratings do not
7 capture, and in particular at this time saying we'd like to
8 better understand exceptional talent, role of context cases,
9 role of the personal statement/essay, measures of
10 socioeconomic status.

11 Q. And are those all -- is that all information that was not
12 included in the modelling process that OIR conducted?

13 A. It was not included.

14 Q. That information that may play a role in the Harvard
15 College admissions process?

16 A. Yes, I believe so.

17 Q. Are applicants to Harvard College who may have exhibited
18 exceptional talent, which was the reason for their admission,
19 are those applicants necessarily going to be included in that
20 output of Model 4 that we were just looking at?

21 A. No.

22 Q. Applicants to Harvard College who wrote a compelling
23 personal statement that may have played a role in their
24 admission, would they necessarily be included in that output
25 to Model 4 that we were just looking at?

1 **A.** Not necessarily.

2 **Q.** And applicants to Harvard College who may have come from
3 a more modest socioeconomic background and that may have
4 played a role in their admission to Harvard College, would
5 they be reflected in that output of Model 4 we were just
6 looking at?

7 **A.** Not necessarily.

8 **Q.** What does the information on this Slide 36 tell you about
9 OIR's modelling analysis in 2013?

10 **A.** That we were wanting to get further insight from having
11 additional factors and variables and trying to ask questions
12 of the content experts to see if there were things we weren't
13 capturing and wanted to -- would help us to understand the
14 admissions process.

15 **Q.** Can you draw any conclusion from the modelling exercise
16 in Exhibit P12 about the effect of race on Harvard College
17 admissions decisions?

18 **A.** No.

19 **Q.** Did you draw any conclusion in 2013 from Exhibit P12
20 about the effect of race on admissions decisions?

21 **A.** No.

22 **Q.** Did you tell Dean Fitzsimmons in 2013 that the models
23 contained in Exhibit P12 provided any information about the
24 effect of race on admissions decisions?

25 **A.** No.

1 **Q.** Can you draw any conclusion from Exhibit P12 about the
2 effect of the personal rating on admissions decisions?

3 **A.** No.

4 **Q.** Did you tell Dean Fitzsimmons in 2013 that you could draw
5 any conclusion from P12 about the effect of the personal
6 rating on admissions decisions?

7 **A.** Not that I recall.

8 **Q.** Can you draw any conclusions from the modelling exercise
9 in P12 about the effect of any single factor on admissions
10 decisions?

11 **A.** No, you cannot.

12 **Q.** You discussed the meeting you had in February 2013 with
13 Ms. Hacker. Do you recall that?

14 **A.** Yes.

15 **Q.** Did Dean Fitzsimmons tell you during that meeting to stop
16 working on the modelling analysis?

17 **A.** No.

18 **Q.** At any point after the meeting did Dean Fitzsimmons tell
19 you to stop working on the modelling analysis?

20 **A.** No. No one has ever told us to stop working on anything.

21 **Q.** Did anyone ever tell you to stop working on this
22 particular analysis?

23 **A.** No.

24 **Q.** In fact, you testified earlier that OIR did try and do
25 some additional work on this analysis, right?

1 **A.** I think the team did some additional work on things that
2 were in this presentation.

3 **Q.** Did you believe in 2013 that the analysis in Exhibit P12
4 showed discrimination against Asian-Americans in the Harvard
5 College admissions process?

6 **A.** No.

7 **Q.** Did you tell Dean Fitzsimmons in 2013 that you thought
8 the modelling exercise in P12 showed discrimination against
9 Asian-Americans?

10 **A.** No.

11 **Q.** Do you believe today that this analysis in P12 shows
12 discrimination against Asian-Americans in the Harvard College
13 admissions process?

14 **A.** No.

15 **Q.** Let's look, please, at Exhibit P26, which is Tab 3 in
16 your binder. You discussed some earlier drafts of this memo
17 with Ms. Hacker. Do you remember that?

18 **A.** I do.

19 **Q.** If you can, take a look at the second and third page of
20 Exhibit P26. The discussion in P26 relates to a logistic
21 regression model, correct?

22 **A.** I'm sorry. Could you repeat the question?

23 **Q.** Sure. There's a discussion in the bottom of the first
24 page of P26 about a logistic regression model.

25 **A.** Yes.

1 **Q.** Is this the same regression model as the one we were
2 discussing in P12?

3 **A.** No, I don't -- no, it's not.

4 **Q.** Is this a different model?

5 **A.** This is a different modelling exercise, yes.

6 **Q.** Is the modelling exercise in Exhibit P26 a refinement of
7 the model in P12?

8 **A.** No. I don't see it that way.

9 **Q.** Does the modelling exercise in Exhibit P26 rely on the
10 same data set as Exhibit P12?

11 **A.** No. It says this is classes 2009 through 2016. Those
12 aren't the same exact years.

13 **Q.** Was the analysis in P26 conducted at Dean Fitzsimmons'
14 request?

15 **A.** Yes.

16 **Q.** And what was the purpose of the analysis in Exhibit P26?

17 **A.** He had been interested in some of the popular press
18 around being able to get highly qualified low-income students
19 to apply for admissions and wanted to understand whether in
20 the Harvard College admissions process there was a tip given
21 to low-income students.

22 **Q.** On page 23549 of this memo, which is the second page of
23 the actual memo, in the middle of the third paragraph does
24 OIR point out any limitations to the analysis?

25 **A.** Yes.

1 **Q.** And beginning with "this approach," can you please read
2 some of the limitations that were pointed out in this
3 memorandum?

4 **A.** "This approach has several limitations. We picked a
5 small set of variables that would factor in admissions
6 decisions. The selection of a wider set of variables might
7 result in a better-fitting model, one that accounts for more
8 of the variation in individual applicants and their
9 potentially unique contributions to the entering class.

10 "For example, the model does not capture
11 exceptional talent in art or music explicitly, although
12 ratings may capture some aspect of these attributes. In
13 addition, our model is limited to main effects, not in
14 examining interactions between variables.

15 "Our analysis should not be considered exhaustive."

16 **Q.** Do you agree with those limitations that you've just laid
17 out in that memo? Are those correct?

18 **A.** Yes, I do.

19 **Q.** Did those limitations affect the analysis that OIR
20 conducted in Exhibit P26?

21 **A.** Yes.

22 **Q.** How so?

23 **A.** They were limited and not including the factors, as we
24 listed here.

25 **Q.** And how does that affect the extent to which conclusions

1 can be drawn from this analysis?

2 **A.** I think of these as being able to show some signal of the
3 variables relative to one another, not beyond just the
4 modelling exercise.

5 **Q.** Why did you list the limitations to the methodology and
6 data sources in the memo sent to Dean Fitzsimmons?

7 **A.** I think we wanted to make sure he understood that this
8 was a limited modelling exploration to try to answer his
9 question.

10 **Q.** Do you recall speaking earlier with Ms. Hacker about an
11 email exchange you had with Ms. Heenan around the time of
12 this memo?

13 **A.** I do.

14 **Q.** And if you could look, please, at the first page of the
15 memorandum, the first sentence. If you can please read "As
16 you have discussed with us.

17 **A.** "As you have discussed with us, there may be value in
18 responding to recent press about the rate of admission for
19 low-income students at elite institutions and in particular
20 for Harvard College."

21 **Q.** So was it your understanding that the analysis you were
22 conducting was potentially to be released publicly?

23 **A.** Yes.

24 **Q.** And Ms. Heenan, you testified in response to Ms. Hacker's
25 questions, was involved in Harvard public affairs and

1 communications at the time?

2 **A.** Yes.

3 **Q.** Why did you discuss this analysis with Ms. Heenan?

4 **A.** I think you would want, if there was something to be made
5 public, for them to be involved. And in addition, I think I
6 was aware that taking any individual factor and not having it
7 in context could be construed in narrow ways and in ways that
8 could be problematic.

9 **Q.** Does the analysis in Exhibit P26 evaluate whether Harvard
10 discriminates against Asian-Americans in its admissions
11 process?

12 **A.** No.

13 **Q.** What was of the main focus of this memo?

14 **A.** The main focus was on understanding the so-called tip for
15 low-income students.

16 **Q.** When you sent this memorandum to Dean Fitzsimmons in
17 2013, did you believe it showed discrimination against
18 Asian-American applicants?

19 **A.** No.

20 **Q.** And when you reviewed the memo yourself in 2013, did you
21 believe it showed discrimination against Asian-American
22 applicants?

23 **A.** No.

24 **Q.** In 2013, did you believe this analysis showed bias
25 against Asian-American applicants?

1 **A.** No.

2 **Q.** Did you tell Dean Fitzsimmons that you thought this
3 memorandum showed bias against Asian-American applicants?

4 **A.** No.

5 **Q.** Do you recall Ms. Hacker asking you some questions about
6 earlier drafts of this memorandum?

7 **A.** Yes.

8 **Q.** Did you or anyone else at OIR show those earlier drafts
9 to Dean Fitzsimmons?

10 **A.** No, I don't think so.

11 **Q.** Did Dean Fitzsimmons request follow-up on the analysis in
12 this memo?

13 **A.** Yes, he did.

14 **Q.** Let's take a look at Exhibit P29, which is already in
15 evidence.

16 **A.** Sorry, where --

17 **Q.** I'm sorry. It's at Tab 5. Are you there?

18 **A.** I am.

19 **Q.** What is P29, please?

20 **A.** P29 is a cover email and an attached exhibit or set of
21 exhibits entitled "Demographics and Income."

22 **Q.** Is this the follow-up analysis that Dean Fitzsimmons
23 requested?

24 **A.** Yes.

25 **Q.** And this email was sent to Dean Fitzsimmons, correct?

1 **A.** It is.

2 **Q.** What information did Ms. Bever include in her email to
3 Dean Fitzsimmons about that follow-up analysis?

4 **A.** She describes that "In these slides you'll see low-income
5 applicants are more diverse than all applicants to Harvard
6 College. Likewise, a greater share of minority applicants
7 are low income than white applicants. Across all
8 race/ethnicity groups, low-income students are admitted at a
9 higher rate."

10 **Q.** Let's take a look, please, at Exhibit P28, which is Tab 6
11 in your binder. Is this the slide deck that was transmitted
12 via P29?

13 **A.** Yes.

14 **Q.** Take a look at page 2, please, of P28.

15 And does page 2 of P28 contain the same general
16 information as Ms. Bever had included in her email to Dean
17 Fitzsimmons?

18 **A.** Generally, yes.

19 **Q.** Let's take a look at page 3 of P28, please. What does
20 page 3 show?

21 **A.** It shows two pie charts. The first is all applicants by
22 ethnicity for the classes of 2009 through 2016. And the
23 second, applicants with incomes less than 60K by ethnicity.

24 **Q.** And what does page 3 show with respect to Asian-American
25 applicants to Harvard during the years in question?

1 **A.** In the first with all applicants, Asians represent
2 23 percent of the total and in the second represent
3 31 percent of the total.

4 **Q.** And can we look, please, at slide -- I believe it's
5 Slide 3 or 4 of P28 -- the next slide, sorry, 5 -- 6. Sorry.

6 Can we look at Slide 6, please, Mr. Lee? What
7 does this slide show?

8 **A.** Admit rates by ethnicity and income broken -- these bar
9 charts are broken down by low income and then income greater
10 than 60K.

11 **Q.** And does this Slide 6 of Exhibit P28 show the admit rate
12 for low-income Asian applicants as Dean Fitzsimmons had
13 requested?

14 **A.** Yes.

15 **Q.** And is that admit rate higher for low-income
16 Asian-American applicants than it is for non-low-income Asian
17 Americans?

18 **A.** Yes.

19 **Q.** Was that the analysis Dean Fitzsimmons had requested?

20 **A.** Yes. He had, I think, not requested a specific analysis
21 but us to be responsive to that general question.

22 **Q.** And these slides were sent to Dean Fitzsimmons in
23 Exhibit P29, correct?

24 **A.** Correct.

25 **Q.** Ms. Driver-Linn, do you think that any of the OIR

1 analyses that we've looked at today or that Ms. Hacker showed
2 you showed discrimination or bias against Asian-Americans in
3 the Harvard College admissions process?

4 **A.** No.

5 **Q.** Why not?

6 **A.** I don't believe that they -- I believe all of them are
7 explorations and models that can't speak to the actual
8 admissions process. They are trying to be informing,
9 understanding, and all of them were very limited in the
10 number of variables and factors that were used.

11 **Q.** Did you ever tell Dean Fitzsimmons in 2013 or any time
12 after that you thought any of OIR's modelling analyses showed
13 any sort of discrimination or bias against Asian-Americans in
14 the admissions process?

15 **A.** No.

16 **Q.** Did Dean Fitzsimmons ever ask you to stop any analysis
17 that you were conducting related to Harvard College
18 admissions process?

19 **A.** No.

20 **Q.** Did anyone ever ask OIR to stop conducting any analysis
21 relating to Harvard College admissions process?

22 **A.** No.

23 **Q.** If you thought that any OIR analysis showed evidence of
24 discrimination or bias, what steps would you take?

25 **A.** I'm not sure exactly, but I would definitely go up the

1 food chain and try to let people know.

2 **Q.** When you say "go up the food chain," what do you mean by
3 that?

4 **A.** I mean talk with those who are higher than me in the
5 hierarchy of the university.

6 **Q.** And to whom do you directly report or did you as the head
7 of OIR?

8 **A.** As the head of OIR, it was to the deputy provost who then
9 reported to the provost.

10 **Q.** Did you contact either the deputy provost or the provost
11 in 2013 to alert them about any analysis you thought showed
12 discrimination or bias?

13 **A.** No.

14 **Q.** Why not?

15 **A.** I wasn't concerned. I didn't feel that there was a need
16 to raise any alarm.

17 MS. ELLSWORTH: Thank you. I have no further
18 questions.

19 MS. HACKER: Your Honor, SFFA has no further
20 questions for this witness.

21 THE COURT: You're excused.

22 MR. MORTARA: Your Honor, Students for Fair
23 Admissions will call Director Marlyn McGrath.

24 Can we have a five-minute break to set up?

25 THE COURT: Sure.

1 (Court recessed at 1:45 p.m.)

2 THE CLERK: Can you please stand and raise your
3 right hand.

4 (MARLYN McGRATH duly sworn by the Deputy Clerk.)

5 THE CLERK: Thank you. You may be seated. Can you
6 please state your name and spell your last name for the
7 record.

8 THE WITNESS: My name is Marlyn McGrath,
9 M-C-G-R-A-T-H.

10 THE COURT: I'm ready when you are.

11 EXAMINATION

12 BY MR. MORTARA:

13 **Q.** Good afternoon, Director McGrath. My name is Adam
14 Mortara. It's nice to meet you.

15 I think you might have answered my first question
16 already, which is what do I call you. Sometimes in my head I
17 call you Director McGrath. Sometimes I call you Director
18 McGrath Lewis, sometimes I call you Ms. McGrath, Dr. McGrath.

19 **A.** You can call me anything you like. Marlyn is fine.

20 **Q.** Don't go that far, ma'am. I'm going to stick to Director
21 McGrath most of the time. I just want to make sure I got it
22 the way you want.

23 I understand you're a Harvard graduate yourself or,
24 more technically maybe, a Radcliffe graduate. Is that right?

25 **A.** Yes.

1 **Q.** What's the difference, for slightly younger people
2 like --

3 **A.** How much time do you have? There's no difference. I am
4 from an era when the degree was granted originally by
5 Radcliffe College. I have a Harvard degree.

6 **Q.** You have a master's and a Ph.D. from Harvard, right?

7 **A.** Correct.

8 **Q.** When did you get those?

9 **A.** My Ph.D. was in 1978.

10 **Q.** That's in English literature, if I remember right?

11 **A.** In Celtic languages and literatures.

12 **Q.** Can you tell us what you did after you got all these
13 degrees up until you became director of admissions in I think
14 it's 1987. If I got that wrong, correct me.

15 **A.** I was various kinds of dean. I was a residential dean.
16 I was a lecturer in Celtic languages, and I worked in
17 academic departments in academic planning in the faculty of
18 arts and sciences. In 1987, I became director of admissions
19 for Harvard College -- Harvard and Radcliffe College.

20 **Q.** Residential dean at Harvard. Is that right?

21 **A.** Yes.

22 **Q.** What does a residential dean do? Do you live amongst the
23 students?

24 **A.** Yes.

25 **Q.** You so you got to know the students very well. What

1 years were those?

2 **A.** 1978 to 1981.

3 **Q.** Did you enjoy it?

4 **A.** I loved it.

5 **Q.** So your job as director of admissions today and going
6 back to 1987 -- and if it's different, let me know -- is to
7 oversee the work of the admissions office, correct?

8 **A.** Yes.

9 **Q.** And in addition to that -- withdrawn.

10 To explain, Director McGrath, I've read about a
11 thousand of your documents. What I perceive is that in
12 addition to that, you have an internal university role in
13 that many Harvard personnel, including faculty and
14 administrators, turn to you with questions about the
15 admissions process. Is that right?

16 **A.** That is correct.

17 **Q.** And you also I think have, from what I've seen, a
18 public-facing role that you've spoken externally to groups
19 about Harvard admissions, correct?

20 **A.** Yes.

21 **Q.** For instance, I think you went to England in 2013 and
22 spoke at something called the Suffolk Institute. Is that
23 right?

24 **A.** The Sutton Trust.

25 **Q.** Sutton Trust. That's it.

1 The public-facing role also sometimes concerns
2 responding to people from the outside world, no connection to
3 Harvard, with inquiries about Harvard admissions?

4 **A.** Yes, that's true.

5 **Q.** That can even be students who email the admissions office
6 with questions about how it works?

7 **A.** Yes.

8 **Q.** And part of your job in sort of a mix of that
9 internal-external role is receiving inquiries from alumni
10 about Harvard admissions; is that right?

11 **A.** Yes.

12 **Q.** And you respond to those, too, right?

13 **A.** Yes.

14 **Q.** Now, we've talked -- you weren't here because you weren't
15 here, but you heard about -- you were here for my opening,
16 right?

17 **A.** I was, yes.

18 **Q.** And you listened to it?

19 **A.** Yes.

20 **Q.** I hope it wasn't boring. But we've heard a lot -- to
21 give you a narrative, we've heard a lot about the Unz
22 article. You read the Unz article when it came out in 2012,
23 right?

24 **A.** Yes.

25 **Q.** I'm not sure you remember, but I think you might have

1 read it between about 1:00 and 8:00 p.m. on November 28,
2 2012. Does that sound about right?

3 **A.** I can't challenge that.

4 **Q.** I'm going to help you remember that. If you would, turn
5 in your binder that's in front of you there.

6 Or did anybody get you the binder?

7 **A.** Do I have a binder? I don't think I do.

8 **Q.** I'll get you a binder, Director McGrath. There's a few
9 things I can be helpful with.

10 MR. MORTARA: Your Honor, may I approach the
11 witness?

12 THE COURT: Of course, yes.

13 BY MR. MORTARA:

14 **Q.** For the record, Director McGrath, there's some tabs here.
15 You can turn to all the document. They're labeled by
16 plaintiff's and defendants's numbers, and I'll use P and D.
17 If you have trouble finding something, just let me know.

18 **A.** I will.

19 THE COURT: Mr. Mortara, I have another
20 not-very-smart question.

21 Dean of admissions versus director of admissions?

22 THE WITNESS: I work for Bill Fitzsimmons. There
23 is on the other side of the house a director of financial
24 aid. It's not explainable much beyond that. We divide work.

25 BY MR. MORTARA:

1 **Q.** Let me see if I can help. There's an office that's the
2 office of admissions and financial aid or financial aid and
3 admissions. Which is it?

4 **A.** Admissions and financial aid.

5 **Q.** Dean Fitzsimmons is the head of that unit, correct?

6 **A.** Yes.

7 **Q.** And then underneath there's admissions and then there's
8 financial aid, right?

9 **A.** Yes.

10 **Q.** And you're in charge of admissions?

11 **A.** I oversee the office, yes.

12 **Q.** All right. Now, if you would, turn to Plaintiff's
13 Exhibit 220. Plaintiff's Exhibit 220 is a series of emails
14 to and from you. I want to see if this refreshes your
15 recollection first about whether you read the Unz article
16 sometime on November 28, 2012.

17 **A.** Yes, I see this.

18 MR. MORTARA: I'm going to offer Plaintiff's
19 Exhibit 220.

20 MR. LEE: I would object if it's being offered for
21 its truth. There's hearsay within the document itself, for
22 which there's no exception.

23 MR. MORTARA: Your Honor, you're looking at the
24 email, I hope.

25 THE COURT: I have the email in front of me.

1 MR. MORTARA: I can go through with you right now.
2 There's plenty of statements in here from Director McGrath
3 herself. She's a party. There those are party admissions.
4 There's an inquiry coming in from somebody else at Harvard;
5 she's answering it, talking about the Unz article.

6 THE COURT: I'm just reading this quick, but
7 there's no -- I don't see any hearsay on the first page.

8 MR. LEE: It would be the third page, Your Honor.
9 The bottom half of the third page is the hearsay within the
10 document. I'm not objecting to Director McGrath's
11 statements.

12 THE COURT: Are you talking about Ted Gilman?

13 MR. LEE: It's a summary of Unz's article that's at
14 the bottom half under the RD.

15 MR. MORTARA: I'm not going to ask her about it,
16 Your Honor.

17 MR. LEE: But it shouldn't come in for its truth.

18 MR. MORTARA: I'm not offering it for its truth.
19 It's the entire email chain that she saw and responded to.

20 THE COURT: The email chain is admitted. To the
21 extent that there's hearsay in it, I won't consider it for
22 the truth of the matter asserted.

23 MR. LEE: That's fine, Your Honor.

24 (Plaintiff Exhibit No. 220 admitted.)

25 BY MR. MORTARA:

1 **Q.** With that out of the way, let's talk about Plaintiff's
2 Exhibit 220. This is an email chain. When you get to the
3 end of it, it starts with somebody called Robert Dujarric.
4 Am I pronouncing that correctly? Do you even know him?

5 **A.** I do not know him.

6 **Q.** Neither one of us will know if we're pronouncing his name
7 correctly unless you know how it's pronounced. Do you?

8 **A.** I have no idea.

9 **Q.** So we're just going to call him Robert D so that if he
10 reads the transcript someday neither one of us --

11 MR. LEE: Your Honor, if we could have a little
12 less of the commentary and just have questions? We're going
13 to be here until Thanksgiving.

14 MR. MORTARA: I heard about Mr. Lee's cousin
15 yesterday. I'm going to try to be conversational, if that's
16 okay.

17 THE COURT: Don't you want to wait for my answer?

18 MR. MORTARA: I said if that's okay.

19 THE COURT: And you kept right on going.

20 MR. MORTARA: You're right.

21 THE COURT: It would be fine for this afternoon.

22 I take your point, Mr. Lee, but it does help break
23 up the day.

24 MR. MORTARA: Thank you, Your Honor. I'll try to
25 keep it limited.

1 BY MR. MORTARA:

2 Q. And it starts off with this email from Robert D, and he's
3 writing to Ted Gilman and some others.

4 Who is Ted Gilman?

5 A. Ted Gilman is an administrator at the Reischauer
6 Institute For Japanese Studies At Harvard.

7 Q. He's forwarding some concerns about the Unz article. I
8 don't want to get into what other people said. I kind of
9 want to get into what you said. So let's delete that and
10 come back up. We'll go to the previous page.

11 Now you can see Ted Gilman's email to you. Let's
12 get where you get involved here. All right? Do you see
13 that?

14 A. Yes.

15 Q. November 28, 2012, 8:46 a.m.?

16 A. Yes.

17 Q. Are you with me?

18 A. Yes.

19 Q. "Dear Marlyn. I hope your fall term is going smoothly.
20 How did December get here so quickly? An alum and friend,
21 Robert D, '83 below, sent the following email. The sniff
22 test suggests the piece is a witch hunt. It's written by Ron
23 Unz, college '83, and is published in The American
24 Conservative, full text link below."

25 And then he goes on with some criticisms that he

1 has of the Unz piece, correct?

2 **A.** Yes.

3 **Q.** I take it that means that Mr. Unz is, in fact, a graduate
4 of Harvard College as well?

5 **A.** I can't confirm or deny that. We have what we have in
6 front of us. I have no reason to doubt it.

7 **Q.** Is that what you understood Mr. Gilman to be saying here,
8 that Unz was a graduate of the college?

9 **A.** That is what I understood.

10 **Q.** Up at the top, we have your response. I'll try to blow
11 it up just a little bit more. It comes in at 1:36 p.m. Do
12 you see that?

13 **A.** Yes.

14 **Q.** And it says, "Ted, I shook my head at this, too."

15 Do you see that?

16 **A.** I do.

17 **Q.** And then, "We are in the throws of EA committees" --

18 That's early action committees, right?

19 **A.** Right.

20 **Q.** -- "and can't be helpful with deconstruction or comment
21 but will do in due course."

22 Do you see that?

23 **A.** Yes.

24 **Q.** "Thanks so much for looking out for us all. M."

25 That's you, right, Marlyn McGrath?

1 **A.** Yes.

2 **Q.** Then right above that, Mr. Gilman or Dean Gilman responds
3 and says, "I apologize for bothering you."

4 Do you see that?

5 **A.** I do.

6 **Q.** And now let's go back to the second page. I'm going to
7 try to blow up your email there. Here we go. And you then
8 at 8:33 p.m. on the same day respond to Ted Gilman, correct?

9 **A.** Yes.

10 **Q.** Your first statement to Ted in your response is, "Just
11 had a chance to read this," right?

12 **A.** Yes.

13 **Q.** Now, we know you probably read the article sometime on
14 the afternoon or evening of November 28, right?

15 **A.** This probably refers to that document, yes, I would
16 assume.

17 **Q.** The Unz article. Okay. And "After I emerged from
18 committee and it is what I thought, a hodgepodge of old
19 chestnut arguments."

20 Do you see that?

21 **A.** Yes.

22 **Q.** I want to talk to you about a lot of what's written here.
23 And I think that Mr. Lee will have a chance to talk about it
24 if he wants to as well. I'm going to come back to this
25 several times. We'll use it as a kind of launching-off point

1 for discussions. The first thing I wanted to talk about was
2 a comment you make at the bottom.

3 When faculty and other stakeholders of Harvard ask
4 you questions or engage you with questions about the
5 admissions process, do you try to be accurate and truthful in
6 your responses?

7 **A.** Yes, I do.

8 **Q.** And so I want to ask you about the highlighted statement
9 on the screen at the end of your email to Mr. Gilman. And it
10 says, "We look for the people with the most promise for the
11 future and we make every decision on the basis of
12 achievement, in the context of what the applicant has done
13 with what he has had, etc."

14 Is that statement accurate?

15 **A.** You read it correctly, and I -- yes.

16 **Q.** It's an accurate statement about how Harvard admissions
17 at Harvard College works?

18 **A.** Yes.

19 **Q.** Director McGrath, I want to take this off the screen and
20 I just want to ask you a general question.

21 Is it true that sometimes when you speak to people
22 about admissions like when you're at the Sutton Trust --

23 Is it in England?

24 **A.** Sutton Trust, yes.

25 **Q.** You spoke about admissions. I actually watched --

1 anyway. Spoke about admissions at the Sutton Trust, correct?

2 **A.** Yes.

3 **Q.** And it's true sometimes when you speak to people about
4 Harvard admissions, you do so in generalities that might not
5 be completely accurate. Is that fair to say?

6 **A.** Do you have an example in mind?

7 **Q.** I think we're going to get to one. What I'm trying to
8 help you with -- what I'm trying to say is, do you sometimes
9 speak about Harvard admissions at sort of a level of
10 generality, like maybe what we just saw with Mr. Gilman, that
11 doesn't tell the complete truth or the complete picture?

12 **A.** When I speak about Harvard admissions, I speak about it
13 accurately in the context of the people -- as I understand
14 the context of the people I'm speaking with.

15 **Q.** And that includes the statement to Ted Gilman, "We look
16 for the people with the most promise for the future, and we
17 make every decision on the basis of achievement."

18 You believe that Harvard College makes every
19 admission decision on the basis of achievement; is that
20 right?

21 **A.** We make every admission decision on the basis of
22 achievement and a good many other factors as well. I think
23 there's no decision we make to admit someone that does not
24 include a measure of achievement.

25 **Q.** What's the Z list?

1 **A.** The Z list is shorthand for a list of people for whom at
2 the end of each cycle -- this has been true in recent years;
3 I can't tell you when it began -- are people who we wish to
4 admit and for whom we do not offer a place for the coming
5 year. We may not have room.

6 It is a list of people who are admitted but for a
7 subsequent year.

8 **Q.** And about how many people get in off the Z list each
9 year?

10 **A.** Several dozen. It has varied somewhat from year to year.
11 I can't tell you precise numbers.

12 **Q.** Is one factor considered on whether to admit an applicant
13 under the Z list is whether they're a child or relative of a
14 major donor?

15 **A.** We take lots of things into account in decisions not just
16 for the Z list but at other times, and that may be in a given
17 case something that is considered by the committee, yes.

18 **Q.** You take lots of things into account. But one of the
19 things you might take into account in putting somebody on the
20 Z list is whether the applicant is a child or relative of a
21 major donor; is that correct?

22 **A.** It may be part of a strong case, and it may help us
23 decide to admit the person.

24 **Q.** Can it be part of a terrible case?

25 **A.** It could be part of a terrible case. But that person is

1 unlikely to be admitted, in my experience.

2 **Q.** We'll talk about that in a second.

3 Can somebody's being a celebrity or the daughter or
4 son or relative of a celebrity be a reason that they get on
5 the Z list?

6 **A.** What do you mean by "celebrity"?

7 **Q.** Oh, I don't know. Movie star or somebody who is big in
8 business, whatever you think.

9 **A.** I can recollect no such case. But I can't tell you that
10 it's never happened.

11 **Q.** Could somebody's relationship to perhaps a politician be
12 a reason that they get on the Z list?

13 **A.** Not in and of itself.

14 **Q.** Could it be one of the many things you look at when
15 deciding to put somebody on the Z list?

16 **A.** Without having a case in mind, I suppose it could.

17 **Q.** Now I need to get into some subjects, some things out of
18 the way, and they're going to involve some of your other
19 emails. And I want to get something clear. I am sure that
20 sometimes you've written emails never ever thinking they were
21 going to come out in a public setting like this. Isn't that
22 right?

23 **A.** That's true.

24 **Q.** I think that's true frankly of all of us. So what I'm
25 going to try to do is we're going to turn off the gallery

1 screen now, if that's okay, Your Honor, and I'm going to talk
2 to you about Plaintiff's Exhibit 257 in your binder.

3 MR. LEE: Your Honor, we have no objection to the
4 screen being turned on. I think it suggests more with the
5 screen off than to let --

6 THE COURT: Hold on a second. Let me just read it.

7 MR. MORTARA: I'm happy to turn the screen on if
8 Director McGrath wants it on.

9 THE COURT: Why don't we leave that up to Director
10 McGrath. I'm fine with it on the screen. You're fine with
11 it on the screen. Why don't you take a look at it and see
12 what your preference is.

13 THE WITNESS: Thank you for that, Your Honor. I
14 will take the advice of my counsel.

15 MR. MORTARA: And you would like it displayed.

16 THE WITNESS: I would defer to their advice. I
17 have no objection.

18 THE COURT: Displayed?

19 MS. ELLSWORTH: Yes.

20 THE WITNESS: Thank you.

21 BY MR. MORTARA:

22 Q. Director McGrath, now what we have on the screen, in the
23 middle of the screen is an email written I think by you,
24 July 24, 2013, at 8:44 a.m. Do you see all that? And it's
25 signed "X, Mum." Do you see that?

1 **A.** I do.

2 **Q.** I'm going to get into the content of this. This is an
3 email exchange you had with your daughter; is that right?

4 **A.** That's correct.

5 **Q.** And your daughter is involved in the Harvard D.C. Club;
6 is that right?

7 **A.** Yes.

8 **Q.** She interviews candidates for admission as part of
9 Harvard's alumni interviewing program, right?

10 **A.** Yes.

11 **Q.** And down at the bottom, this starts off with a forwarded
12 message from David Evans to a bunch of redacted email
13 address, subject line, "Wait-list applicant offered a Z."

14 Do you see that?

15 **A.** Yes, I do.

16 **Q.** Who is David Evans?

17 **A.** David Evans is my colleague who was one of the admissions
18 officers who handles candidates from D.C., from the greater
19 D.C. area.

20 **Q.** "Just a note to inform you that the admissions offered
21 so-and-so of so-and-so a Z; that is, a place in the class of
22 2018."

23 That's a notification that someone was offered a Z
24 list acceptance, correct?

25 **A.** Yes.

1 **Q.** And then up above, from context I think you can tell this
2 is an email from your daughter to you. Can you tell that
3 from context?

4 **A.** Yes, I can tell that from context.

5 **Q.** Your daughter says, "This is interesting. I am not a
6 huge fan of the mother who just started interviewing for us a
7 couple of years ago. Harvard really cleaned up even before
8 this at" -- redacted -- "and I'm not sure he was terribly
9 strong."

10 Do you see that?

11 **A.** I do.

12 **Q.** And then you respond to your daughter right here. And
13 the first thing, very first thing you say is what?

14 **A.** "Terrible case."

15 **Q.** This is a terrible case that got admission off the Z
16 list, right?

17 **A.** Well, "terrible case" may refer to the case itself. I
18 don't recall doing this email, though I have no doubt that
19 it's mine.

20 **Q.** You were asked about -- excuse me. Go ahead.

21 **A.** It may also have referred to the terrible situation of a
22 mother on the inside but not on the inside. But I actually
23 don't know. But yes, I see those words and that's what I
24 wrote.

25 **Q.** And to be fair to you, you saw this document at your

1 deposition, right?

2 **A.** I did, yes.

3 **Q.** And the next sentence says, "We did it entirely for
4 contingent reasons" -- "We did it for entirely contingent
5 reasons." Do you see that?

6 **A.** I do.

7 **Q.** What were the entirely contingent reasons, if you
8 remember them?

9 **A.** I don't remember them from memory. I think that it was
10 what was described in the email below, an alum mother who was
11 also involved in the schools committee.

12 **Q.** So it was the influence of a Harvard alum got this
13 terrible case admitted that your daughter said was not sure
14 he was terribly strong; is that right?

15 **A.** It may have been taking into account the mother's
16 involvement. I don't know for certain.

17 **Q.** Director McGrath, I really hate to do this. Did you
18 suggest earlier that the "terrible case" comment may have had
19 something to do with this applicant's mother or the
20 situation?

21 **A.** I don't remember what it was referring to. I was giving
22 you a sense of what it might refer to.

23 **Q.** Your daughter then criticizes the mother of this
24 applicant, correct?

25 **A.** I only have in front of me her email, and that's what she

1 seems to be doing.

2 **Q.** And you respond to that criticism at the top, correct?

3 **A.** Yes.

4 **Q.** All right. I'll put that down.

5 Do you agree that what's being communicated here is
6 that Harvard has let in a candidate who was not terribly
7 strong, for whatever you described as contingent reasons,
8 correct?

9 **A.** I don't see anything here that suggests that the
10 candidate had no strengths.

11 **Q.** Your daughter told you that her belief was that the
12 candidate was not terribly strong, correct? She said that?

13 **MR. LEE:** Your Honor, I'm going to object. This
14 has gone way beyond the point of being relevant. It has
15 nothing to do with discrimination against Asian-Americans.

16 **MR. MORTARA:** Your Honor --

17 **THE COURT:** I think he's trying to impeach the
18 witness.

19 **MR. MORTARA:** There is that.

20 **MR. LEE:** With her daughter's statement.

21 **MR. MORTARA:** That's not being offered for the
22 truth. It's being offered for what it said.

23 And Your Honor, part of our case is that Harvard is
24 not entirely truthful about its admissions process, including
25 that it is totally meritocratic.

1 THE COURT: I will give you some latitude on it,
2 but you are pushing the edges of it. I think you made your
3 point with this email.

4 MR. MORTARA: I'm going to move on, then, Your
5 Honor.

6 THE COURT: Go ahead.

7 BY MR. MORTARA:

8 Q. I want to talk to you about staff interviews. How are
9 staff interviews offered to applicants?

10 A. How are staff interviews offered to applicants? In
11 several ways. They are offered or have been in some years on
12 a first-come, first-serve basis typically during the summer.
13 They are also offered from time to time in certain
14 circumstances. Shall I describe one?

15 Q. Sure.

16 A. A candidate who's coming from a long distance or an area
17 of the country where we think there will not be an alumni
18 interview available. We interview people or speak with
19 people sometimes when they have parents who are involved and
20 they would like their child to come by and meet an admissions
21 officer.

22 There are various other kinds of times when we see
23 candidates interviewed by staff in our office. Also they can
24 be interviewed elsewhere; when staff are traveling, often we
25 meet people.

1 **Q.** Would it be particularly accurate to say staff interviews
2 come on a first-come, first-serve basis?

3 **A.** The first case I mentioned, yes. We post a certain
4 number of available interviews and members of the public may
5 sign up for them in advance. That was the first example I
6 gave.

7 **Q.** About how many of these staff interviews take place in a
8 given admit cycle, in a given year? Would 500 sound about
9 right?

10 **A.** To be honest, I don't -- I can't give you a number and I
11 can't confirm that one.

12 **Q.** So who organizes all the staff interviews? That's under
13 admissions, right, where you're in charge?

14 **A.** It is under admissions. And my staff use their judgment
15 about people from their area visiting. Sometimes we have to
16 assign someone who happens to be in the office and available.
17 I keep no tally, and I don't arrange most of them myself.

18 **Q.** Do you do any of them?

19 **A.** I don't do interview-interviews. I do meet people from
20 time to time, but I don't substitute for an official
21 interview.

22 **Q.** How about this: Are there thousands of staff interviews
23 in an admit cycle?

24 **A.** I don't think so, but I don't -- I can't confirm that. I
25 can't deny it. I don't know.

1 Q. Would you be comfortable with maybe there's hundreds?

2 A. Probably.

3 Q. All right. It's going to be a small percentage of the
4 applicants that get a staff interview, right?

5 A. Thousands or tens of thousands of people have an official
6 interview, an alumni interview, as part of the application
7 process. So that would be a much larger number, yes.

8 Q. I'm talking about staff interviews.

9 A. I understand. But you said a percentage of, which is why
10 I mentioned the larger number that includes -- that adds up
11 to the large number of interviews we offer.

12 Q. Sure. Let me try to make sure we're getting a clear
13 record here.

14 Most people, the vast majority of applicants to
15 Harvard do some kind of interview, right?

16 A. Most people who apply have an alumni interview.

17 Q. A very small portion of the applicant pool interview with
18 a member of your staff, right?

19 A. Yes. A much smaller number.

20 Q. And on your website, you talk about staff interviews,
21 right?

22 A. I think we do.

23 Q. Do you want me to refresh your recollection? I have it
24 right here.

25 A. Fine.

1 MR. MORTARA: Your Honor, may I approach the
2 witness?

3 THE COURT: Of course, yes.

4 A. Thank you.

5 BY MR. MORTARA:

6 Q. And this is just from your website, and I'm putting it up
7 on the screen. And it says "Have a conversation with an
8 alumni interviewer."

9 Do you recognize this from your website?

10 A. Yes, now that I see it, I do.

11 Q. And it says, "We also offer a limited number of
12 on-campus interviews from September through November."

13 Do you see that?

14 A. Yes.

15 Q. And does that refresh your recollection about how you
16 advertise interviews?

17 A. Yes.

18 Q. And you see here that there's an encouragement to do the
19 official local interview. Do you see that?

20 A. Yes.

21 Q. And that's because space is scarce for the staff
22 interview, right?

23 A. Yes.

24 Q. What's the admission rate for somebody that gets one of
25 these scarce staff interviews?

1 **A.** I have no idea, I'm sorry to say.

2 **Q.** Would it surprise you in any way if I told you the
3 admission rate for people who come on campus and interview
4 with one of your staff is over 50 percent?

5 **A.** No.

6 **Q.** Do you have any reason to dispute that that might be the
7 rate, that it might be over 50 percent?

8 **A.** I have no reason to dispute that.

9 **Q.** And that would sort of make sense, right, if you meet
10 somebody on the admissions staff and impress them, then you
11 kind of have an internal advocate within the process, right?

12 **A.** I don't think that's the effect. I don't think that's
13 the explanation.

14 **Q.** What's your general admission rate, Director McGrath?

15 **A.** About 5 percent.

16 **Q.** So if I'm right -- and we'll put on the evidence later in
17 the case. I don't want to bother you with it now if you
18 don't have it off of the top of your head.

19 But if the evidence shows that people who get staff
20 interviews get admitted 50 percent of the time and your
21 general admit rate is 5 percent, it means doing a staff
22 interview is pretty helpful, right?

23 **A.** I don't think you can conclude that it was the having of
24 the interview that made the difference.

25 **Q.** Let's talk about the people that get interviews. You

1 were here for my opening, right?

2 **A.** I was.

3 **Q.** And you heard me say, and I think you might have heard
4 Mr. Lee say something similar, about 5 percent of your
5 applicant pool are in the recruited athletes, legacies,
6 dean's list, and children of faculty or staff group. Would
7 you agree with that?

8 **A.** Yes.

9 **Q.** And they make up about 30 percent of the admitted class.
10 You agree with that, too, right?

11 **A.** I have no reason to doubt that.

12 **Q.** What percentage of the people that get staff interviews
13 are in that ALDC group?

14 **A.** I don't know.

15 **Q.** You don't know if they're overrepresented in the group
16 that do staff interviews?

17 **A.** If who --

18 MR. LEE: I'm going to object to the question
19 because I don't know what "overrepresented" means.

20 MR. MORTARA: I was about to explain. Can I
21 explain, Your Honor?

22 THE COURT: Yes.

23 BY MR. MORTARA:

24 **Q.** So they're 5 percent of the general applicant pool. Are
25 they more than 5 percent of the people that get staff

1 interviews?

2 **A.** I don't know what the number is.

3 **Q.** Would it surprise you that nearly half of the staff
4 interviews your office does are from athletes, legacies,
5 dean's list, and the children of faculty or staff?

6 **A.** I think that's possible. I can't dispute that.

7 **Q.** And you wouldn't have any reason to dispute that
8 20 percent of all the ALDC applicants get these staff
9 interviews. Would you have any reason to dispute that?

10 **A.** No.

11 **Q.** And that would be compared to about 1 percent of the
12 regular non-ALDC applicants. You wouldn't have any reason to
13 dispute that either, would you?

14 **A.** I would not.

15 **Q.** Does that seem like a first-come, first-serve system to
16 you?

17 **A.** What's described here on this website is one group of
18 on-campus interviews which are available to the general
19 public. Earlier I tried to suggest that we do, in addition
20 to that, a number of in-person interviews as needed, in their
21 broad definition for that, of people who are in town who we
22 need to see or who wish to see us and who we're able to see.

23 That's not the same thing as the thing that I think
24 is being described on this website.

25 **Q.** This is kind of what I meant earlier. What you put on

1 your website is a general statement to the public about
2 interviews, right?

3 **A.** Yes.

4 **Q.** Then there's something else. There's interviews you can
5 get in other ways that are not advertised, correct?

6 **A.** Yes. There are interviews we do in other ways?

7 **Q.** And some of the other ways that you can get interviews is
8 if you're the child or relative of a donor; is that right?

9 **A.** That may happen. It does happen.

10 **Q.** And some of the other ways you can get interviews are,
11 for instance, you set aside a quota of interviews for
12 recruited athletes for each team.

13 **A.** We do interview a number of athletes for each team, and
14 we do have a target number for that, yes.

15 **Q.** You have a set-aside number of interview slots for
16 recruited athletes?

17 **A.** Yes. We have a number we agree on not doing more than,
18 yes.

19 **Q.** And you can even get an interview outside of the
20 September-to-November timeframe that you tell the world on
21 the website you can get one if you're in one of these special
22 categories, right?

23 **A.** Yes.

24 **Q.** I want to talk more about your holistic admissions. And
25 that word comes in part from Supreme Court opinions. You

1 recognize the word, right, Director McGrath?

2 **A.** Yes.

3 **Q.** Harvard's been a part of making that word into our
4 Supreme Court law, I think.

5 **A.** Yes. I do recognize the word.

6 **Q.** We've heard a lot -- I wish I wasn't going to say the
7 word *Bakke* because I almost think I'm going to have a
8 response to it, but we've heard a lot about *Bakke* and you've
9 read *Bakke*, haven't you?

10 **A.** Yes.

11 **Q.** I understand you're not a lawyer. I'm not going to try
12 to test your legal acumen, but you've also read the *Grutter*
13 decision, right?

14 **A.** Yes.

15 **Q.** I want to just read you a sentence from *Grutter*, not to
16 ask for legal view but to ask you if it reflects Harvard's
17 college admissions. This is about the Michigan law school.

18 "The law school engages in a highly individualized
19 holistic review of each applicant's file, giving serious
20 consideration to all the ways an applicant might contribute
21 to a diverse educational environment."

22 Does Harvard consider all the ways an applicant
23 might contribute to a diverse educational environment?

24 **A.** We consider all the ways that we're aware of in which
25 that would be true.

1 **Q.** Right. Because of course something that somebody never
2 tells you and is internal to them and you don't know, and
3 they might contribute in some way you never expected, right?

4 **A.** That's right.

5 **Q.** One of the aspects of a person that you consider when
6 you're looking at all the ways you can that an applicant
7 might contribute to a diverse educational environment is that
8 person's race or ethnicity, right?

9 **A.** Yes.

10 **Q.** Now, Director McGrath, you would agree with me that
11 someone's religion can be as or even more important than
12 their race, wouldn't you?

13 **A.** Important for what purpose?

14 **Q.** Important to them. Important to what they'll teach
15 others. I'll get into a few examples in a second.

16 But you agree it can be as important to them, for
17 example?

18 **A.** It certainly could, yes.

19 **Q.** For instance, I'm white, I'm of somewhat Italian
20 extraction, but I'm also Roman Catholic. And it might be
21 more important to me that I'm Roman Catholic than it is what
22 my skin color is, right?

23 **A.** Yes.

24 **Q.** Now I want to talk about religious diversity. An
25 applicant might not choose to mention their religious

1 background in their essays, but it still might be something
2 they would bring to Harvard's pluralistic community, right?

3 **A.** Yes. Right.

4 **Q.** I want to use an example based on me.

5 So imagine a young white gentleman from -- young
6 man from Milwaukee. He goes to college where his best
7 friends are a Muslim, Hindu, and a Catholic. You agree it's
8 possible that both the identity of those three friends as
9 well as their religious background could really add to this
10 suburban Milwaukee boy's experience, don't you?

11 **A.** Yes. I would agree.

12 **Q.** And this would be true even though the three friends just
13 checked boxes on their application and didn't mention their
14 own ethnicity or their religious preferences anywhere, right?

15 **A.** Yes.

16 **Q.** And the Muslim fellow for instance could be a Pakistani
17 or Arab, but maybe the most profound way in which he was an
18 educator of the young boy from Milwaukee is that he was a
19 Muslim. That's not implausible, is it?

20 **A.** No, it's not implausible.

21 **Q.** He's Pakistani, by the way.

22 The Catholic fellow could be Polish-American or
23 Filipino, but maybe the most profound way in which he was an
24 educator of me was that he was Catholic and my confirmation
25 sponsor when I converted in college. Is that possible?

1 **A.** Yes, that's possible.

2 **Q.** He's Filipino.

3 So religion can be very important to who someone is
4 and what they bring to the community and whether they'll be a
5 great educator of others. Would you agree with that?

6 **A.** I would agree that that's possible.

7 **Q.** But Harvard does not track the religious identity of
8 applicants, do you?

9 **A.** No, we do not track them.

10 **Q.** And your paper and online application systems do not
11 allow you to even see the self-proclaimed religious identity
12 of an applicant, correct?

13 **A.** Correct.

14 **Q.** That's the case even though there's a place on the common
15 application for religion, self-proclaimed religion, correct?

16 **A.** Correct.

17 **Q.** There's a place for it on the application. Some
18 applicants provide their religious information, and you
19 choose to ignore it by not even having it transfer to your
20 system, correct?

21 **A.** We have done that on the advice of counsel in
22 Massachusetts. We are in Massachusetts.

23 **Q.** Are you suggesting to me that the reason that Harvard
24 does not look at the religious persuasion of its applicants
25 is because its lawyers told them it might be illegal to do

1 so?

2 **A.** I did not say that Harvard does not look at the religious
3 persuasion of our applicants.

4 **Q.** Harvard chooses to ignore the self-proclaimed religious
5 affiliation of applicants who provide that information on the
6 common application because that's the advice of counsel. Is
7 that what you said?

8 **A.** I would not say that we ignore what we do know, which
9 will not be the information on that box you're referring to.

10 We do take into account, as we say we do,
11 everything we can learn about an applicant. We do not track
12 or preserve the answer given to that opportunity to check a
13 box.

14 **Q.** It's not just track or preserve, ma'am. You don't even
15 allow it to transfer to your system. Your admissions
16 officers don't see it.

17 **MR. LEE:** It's been asked and answered and she said
18 it was on advice of counsel because of Massachusetts law.

19 **BY MR. MORTARA:**

20 **Q.** I just want to clear up one thing, which is that it's not
21 just that you don't retain it. It's that you don't see it.

22 **A.** We don't see it.

23 **MR. LEE:** Right.

24 **BY MR. MORTARA:**

25 **Q.** How is that looking at the whole person if you can't see

1 something that's as important as religion?

2 MR. LEE: Your Honor, on the checking the box, she
3 said why they don't transfer the information. She just said
4 three times they'll look at the information if they find it
5 out otherwise. There's no foundation for this question.

6 THE COURT: That's what I understand she's saying.
7 They don't transfer it from the common app. They don't track
8 it from the common app. But if it appears elsewhere in the
9 application, they --

10 MR. MORTARA: They can look at it. That's
11 completely my understanding to that --

12 THE COURT: If you're trying to make that point,
13 I've already got the point. If you're trying to make a
14 different point, ask the question and then I'll decide
15 whether or not it's going to be --

16 MR. MORTARA: All right. I'll try to make the
17 point through a question rather than directly to Your Honor.

18 THE COURT: Perfect.

19 BY MR. MORTARA:

20 **Q.** Is this a significant obstruction in looking at whole
21 applicants that you're not able to see their self-proclaimed
22 religious identity in the box checking? Not in an essay. I
23 understand if somebody writes "I'm a Catholic and it's really
24 important to me," for instance, I would have written "I'm an
25 atheist and maybe I'm going to meet somebody that's going to

1 convert me to become a Roman Catholic" or whatever.

2 You can take into account what they're writing
3 about themselves in their essays. You do that, right?

4 **A.** Yes.

5 **Q.** Okay. I'm just talking about the fact that you're not
6 allowed to, for whatever reason, look at someone's
7 self-identified religion, I am Roman Catholic, I am Muslim.
8 I am Hindu. Just in the checking of a box or filling out of
9 a form, that's the common app. You got that distinction in
10 your head?

11 **A.** Yes. I want to be sure that I understand your question
12 when it comes to, again --

13 **Q.** Do you consider that to be a significant obstacle in
14 evaluating whole people, that you are not allowed to think
15 about their self-proclaimed religious identity unless they've
16 written about it elsewhere in their application?

17 **A.** We have not considered that to be a disadvantage.

18 **Q.** Would you consider it to be a disadvantage if you
19 couldn't consider their race?

20 **A.** Would I consider it to be a disadvantage if we couldn't
21 consider their race?

22 **Q.** It's the exact same question. So I just asked you about
23 religion in the box and if you can't consider that is that an
24 obstacle. And you said we haven't considered it a
25 disadvantage.

1 **A.** We find it an advantage to be able to consider race.

2 **Q.** Right. But you said it's not a disadvantage that you
3 can't do religion the same way, right?

4 MR. LEE: No.

5 **A.** I did say that.

6 MR. LEE: I object to "in the same way." What are
7 we talking about? Checking the box or what's in the
8 application now?

9 MR. MORTARA: Your Honor, that's not even an
10 objection. I got instructed on this yesterday.

11 THE COURT: Yes. It's not an objection.

12 MR. LEE: I object. The question is vague and
13 ambiguous because we don't know what he's talking about.

14 THE COURT: You can just rephrase the question.

15 BY MR. MORTARA:

16 **Q.** We'll keep working on this until we get it right.

17 MR. LEE: You know, Your Honor, there is a limit.

18 THE COURT: Skip the narrative. Ask the question.

19 BY MR. MORTARA:

20 **Q.** There is a box or there's a form on the common
21 application where someone can say "I am Roman Catholic." Do
22 you understand that?

23 **A.** Yes.

24 **Q.** Harvard doesn't look at that answer. They're not -- they
25 don't do it, for whatever reason, right?

1 **A.** Correct.

2 **Q.** Forgetting about what people say on their essays and all
3 that, I asked you do you find it to be a disadvantage that
4 Harvard doesn't get that information about self-proclaimed
5 religious identity from the common application. And you said
6 we don't find it to be a disadvantage. Do you remember that?

7 **A.** Yes.

8 **Q.** My question is, would Harvard find it to be a
9 disadvantage if they couldn't consider race?

10 **A.** I think we would.

11 **Q.** In the same way, on the box in the application. So it's
12 different between religion and race. That's your testimony?

13 **A.** Yes.

14 **Q.** Why is it different?

15 **A.** Because we have, as you're aware, a practice of giving
16 special consideration to ethnic identity as submitted on
17 those check box materials.

18 **Q.** But you have that special practice of considering ethnic
19 identity in order to get the educational benefits that flow
20 from racial diversity, right?

21 **A.** That's correct.

22 **Q.** Are there educational benefits that flow from religious
23 diversity?

24 **A.** Yes.

25 **Q.** So why isn't it a disadvantage that you can't consider

1 the self-proclaimed religious identity of someone who puts
2 that in on the common application?

3 **A.** When we know it as provided through the other aspects of
4 the candidacy, we may well consider it.

5 **Q.** This is my point. You say it's not going to be a
6 disadvantage that you don't get to see what someone puts in
7 the box on religion, right?

8 **A.** Yes.

9 **Q.** But it is going to be a disadvantage if you can't see
10 their race?

11 **A.** We have found it helpful to know what racial identity a
12 student has given us.

13 **Q.** Would you find it helpful to know the religious identity
14 a student give you?

15 **A.** When it is disclosed to us in the application, we often
16 find it helpful.

17 **Q.** Would you find it helpful if you carried through the
18 information from the common application, just like you carry
19 through the information about race from the common
20 application?

21 **A.** I can't tell you whether we would or not, but we don't.

22 **Q.** You could choose not to carry through the information
23 about race on the common application, just like you've
24 elected to not carry through the information about religion,
25 right?

1 **A.** We have made that choice with the advice of counsel.

2 **Q.** I don't want to know why you made the choice.

3 My point is you could make the choice not to carry
4 through that information about race, just like you've made
5 the choice for whatever reason not to carry through that
6 information about religion, correct?

7 **A.** Yes, that choice could be made.

8 **Q.** You don't even have a hunch as to whether or not a
9 race-blind admissions process would be beneficial or
10 detrimental to diversity on campus at Harvard; isn't that
11 right?

12 **A.** I have a hunch that we would have a different college
13 without taking that factor into account.

14 **Q.** You don't have a hunch as to whether it would be
15 beneficial or detrimental, do you?

16 **A.** I do.

17 **Q.** Could you please turn to your deposition? I'm going to
18 get it for you because you don't have it yet.

19 MR. MORTARA: Your Honor, may I approach?

20 THE COURT: Yes.

21 MR. LEE: Which one?

22 MR. MORTARA: We've got it all in one. It's
23 consecutive. When I use a page, you'll know which one.

24 BY MR. MORTARA:

25 **Q.** Would you turn to page 255, Director McGrath, and let me

1 know when you're there, ma'am.

2 **A.** I'm there.

3 **Q.** At line 21 it says, "Do you have a view as to whether or
4 not a race-blind admissions process would be beneficial or
5 detrimental to diversity on campus?"

6 Your lawyer objected. Go ahead and answer if you
7 can.

8 You asked your own question, "As the director of
9 admissions?

10 "QUESTION: Yes."

11 And this is your answer to the question. "I don't
12 know whether it would. I can't -- I don't have a hunch on
13 that."

14 Do you see that?

15 **A.** I do.

16 **Q.** That was your sworn testimony in this case, right?

17 **A.** That's right.

18 **Q.** I want to talk to you about Harvard's historical use of
19 race, just very briefly. Does Harvard use race in its
20 college admissions process more than it did 15 years ago?

21 **A.** I don't think so, no.

22 **Q.** Does Harvard use race less today in its admissions
23 process than it did 15 years ago?

24 **A.** No, I would not say that.

25 **Q.** So the use of race in Harvard's admissions process has

1 maintained a steady state over the last 15 years. Is that
2 about right?

3 **A.** That is my sense.

4 **Q.** I want to shift focus now to other aspects of the
5 admissions process.

6 Before the full committee, the docket subcommittees
7 have already decided who to affirmatively bring up in full
8 committee; is that right? Correct my language if I'm wrong.

9 **A.** Would you mind repeating the question?

10 **Q.** Sure. There's something called a docket subcommittee.
11 Dean Fitzsimmons was here. There's something called a docket
12 subcommittee.

13 **A.** Yes.

14 **Q.** They produce a list of candidates they want to bring up
15 at full committee. Is that kind of the way to say it?

16 **A.** Yes.

17 **Q.** And before the full committee, those docket subcommittees
18 have decided who they're going to bring up in the full
19 committee, right?

20 **A.** Yes.

21 **Q.** Now, at the beginning of the full committee meeting, you
22 discuss the relative breakdown of applicants by race,
23 correct?

24 **A.** Yes.

25 **Q.** And at the same time, you and Dean Fitzsimmons actually

1 know the racial makeup of not just the applicant pool but
2 also of those who have been passed out of the subcommittee,
3 right?

4 **A.** Yes.

5 **Q.** And the reason you get that information is that it's
6 interesting to you and Dean Fitzsimmons to see what the shape
7 of the group appears to be as it's shaping up, right?

8 **A.** Yes.

9 **Q.** And if you or Dean Fitzsimmons saw the numbers coming out
10 of subcommittee showed a particular racial group was
11 underrepresented, you'd talk about it and give it attention,
12 right?

13 **A.** Yes. But our typical practice is at that juncture and
14 with that information in hand to give the entire committee an
15 overview of the proportions, the shape of the class as it's
16 shaping up along several dimensions, including race.

17 **Q.** Now, after the full committee has voted, there's some
18 fine-tuning of the decisions because you'll still have too
19 many admits, right?

20 **A.** Typically at the beginning of the full committee process,
21 we have some number of applicants in various categories,
22 physical sciences, geography, race and so on. And those are
23 usually the total number and the total -- we're adding a lot
24 of people, and we're also taking away a lot of people. So
25 those are very preliminary numbers, and we typically end up

1 at the end of the process with more people than we have total
2 in front of you us in that one-pager.

3 **Q.** And so there's some fine-tuning that has to take place,
4 right?

5 **A.** You can call it fine-tuning, yes.

6 **Q.** If there was a group that was surprisingly or notably
7 underrepresented, you'd go back and look at those cases,
8 whether it be engineers or whether it be a racial group,
9 correct?

10 **A.** We might or might not. Depending on the strength of the
11 cases and the area people's sense of their own cases that
12 might not at that point have yet been admitted or proposed
13 for admission.

14 **Q.** What's the sufficient level of specificity the office
15 uses for what constitutes good representation of the class?

16 **A.** Well, we don't have a formula or numbers, and we don't
17 have a formulaic way of describing that. We mostly want
18 people to understand where we are then and to take a look at
19 where we are going ahead. It doesn't necessarily change the
20 proportions. It may.

21 **Q.** When you say where we're going then and where we're going
22 ahead, that's last year's numbers were X and this year's
23 numbers look like it's Y. Let's look carefully the these
24 people?

25 **A.** No. What I meant is that people have a sense of where

1 the class is headed at the moment in the context, often, of
2 last year's numbers. And they're at this moment going back
3 and preparing cases to present again or to strengthen, to
4 confirm to keep in the class. It's a piece of information
5 that may help area people.

6 And it also helps us as we fine-tune the final
7 total target number. We do have one target number in our
8 process which is the number of beds in the freshman class.
9 And to yield that number we have to determine or project a
10 total number of candidates to admit. And that chart may help
11 us do that.

12 **Q.** And that clarity is the one-pagers that show all sorts of
13 information, including race?

14 **A.** Yes.

15 **Q.** Now, your goal is to make sure that you're not having a
16 dramatic drop-off in some group from a certain level that you
17 had last year, right?

18 **A.** That's not really a goal. It's something we would like
19 to be aware, but it's not a goal to prevent it.

20 **Q.** Could you look at your deposition at page 269, Director
21 McGrath.

22 **A.** Yes.

23 **Q.** And at line 11 there's a question and quite a lengthy
24 answer, and I will read the entire answer. I want to start
25 with the question and the beginning part of the answer.

1 "Is there anything specific about last year's
2 statistics that makes sense, or is the goal to simply ensure
3 there is not too great a deviation from year to year?

4 "ANSWER: The goal is to make sure -- the goal
5 is -- a goal is to make sure that we're not having a dramatic
6 drop-off in some group who we did at a certain level with
7 last year. And because the numbers I referred to tell you
8 how many applicants that there are this year, if we're not,
9 you know, underconsidering, as it were, applicants who seem
10 to be admitted or at a higher level this year than we seem
11 likely to do. We're looking at dramatic differences in a
12 short period of time. Just as we think about hearing cases
13 at the end, we're talking about this in the context of
14 individual cases, just how members of" -- I think that should
15 be "this" -- "his ethnic group are doing, is this a strong
16 case or perhaps underweighted."

17 Do you see that?

18 **A.** Yes.

19 **Q.** And that was your sworn testimony?

20 MR. LEE: Actually, I think you misread it. It
21 says "we're looking for dramatic differences."

22 MR. MORTARA: Thank you, Mr. Lee.

23 MR. LEE: And you missed the end of the answer
24 which says "is this a strong case that was perhaps
25 underweighted," and the rest is "or is it just not a very

1 good case, period."

2 BY MR. MORTARA:

3 **Q.** And then the next question is, "The goal at the end of
4 the day is to avoid a dramatic drop-off among minority
5 representation within a particular class on any given year?

6 "ANSWER: A goal would be to avoid it by
7 inadvertence or lack of care. Some things can't be avoided."

8 Do you see that?

9 **A.** And that's what I should have said in the first place to
10 your question, your initial question, previous question.

11 **Q.** That's no problem, Director McGrath.

12 You remember we were talking about the Unz article,
13 and it was published in late 2012, right?

14 **A.** Yes.

15 **Q.** And you remember that David Brooks mentioned it in the
16 New York Times in December 2012, do you?

17 **A.** Yes, I do.

18 **Q.** And you got some email and some discussions about Unz.
19 We've already looked at one of them.

20 But you also got some emails and discussions about
21 the Unz article in the early 2013 timeframe, right?

22 **A.** Yes.

23 **Q.** We'll get into that in a little bit.

24 But in that early 2013 timeframe, data about
25 whether Harvard's admissions process was discriminating

1 against Asian-Americans would have been interesting to you?

2 **A.** The press coverage of it was of interest to us.

3 **Q.** But would data about whether or not Harvard's admissions
4 process was discriminating against Asian-Americans been
5 interesting to you at that time?

6 **A.** It would be of interest to us to know what was being
7 published. Yes.

8 **Q.** I don't mean to quibble with you.

9 **A.** Yes.

10 **Q.** I'm just talking about you. I want to just talk about
11 you.

12 Would data about whether or not Harvard's
13 admissions process was discriminating against Asian-Americans
14 been interesting to you in early 2013?

15 **A.** If I understood the data, yes. I'm always interested to
16 look at data.

17 **Q.** And of course, in the course of this case you became
18 aware that in 2013 Harvard's 's Office of Institutional
19 Research had done some work related to this topic, correct?

20 **A.** No, I was not aware of that.

21 **Q.** Are you aware today of work that the Office of
22 Institutional Research was doing in January, February of 2013
23 to analyze whether Harvard's admissions process was biased
24 against Asian-Americans?

25 **A.** I have become aware of those data and that work during

1 the course of preparation for this trial.

2 **Q.** And to be clear, you did not see reports or PowerPoints
3 or memos from OIR on this subject matter in 2013, did you?

4 **A.** I have seen from time to time and had seen from time to
5 time data they had produced for various questions. I frankly
6 don't remember on what topics. They have done research for
7 the president for a long time.

8 **Q.** But you did not see -- you personally did not see any
9 reports or PowerPoints or memos from OIR purporting to
10 analyze the question of Asian-American discrimination in
11 early 2013, did you?

12 **A.** You know, I'm not sure what I saw in what year, but I
13 don't recollect that.

14 **Q.** And you don't remember having any discussions with Dean
15 Fitzsimmons about that work back in early 2013, do you?

16 **A.** About which? About OIR's work?

17 **Q.** About the work that you've become aware of through the
18 course of preparing for this trial that OIR did on the
19 subject of Asian-American discrimination.

20 **A.** I do not recollect anything back then that we discussed.

21 **Q.** Can you think of any reason today why Dean Fitzsimmons
22 would not have included you in the loop with respect to work
23 that OIR was doing on admissions?

24 **A.** I don't know why he didn't.

25 **Q.** I want to go back to that November 28 email chain,

1 Plaintiff's Exhibit 220.

2 MR. MORTARA: And I haven't offered it yet, Your
3 Honor. I am going to offer Plaintiff's 220 now.

4 MR. LEE: I thought it was offered. This is the
5 one with the hearsay within the hearsay.

6 MR. MORTARA: That's my fault. I forgot it's been
7 offered and admitted against the hearsay uses that I said I
8 wasn't going to make. Sorry about that, Mr. Lee.

9 THE COURT: I'm not sure it ever was moved in.

10 THE CLERK: Yes, it was.

11 THE COURT: I didn't have it marked off either.
12 Karen did.

13 BY MR. MORTARA:

14 **Q.** And looking back at your email -- thank you, Ms. Folan.

15 Looking back at your email, we can agree it's a
16 fair thing to say in your email response to Mr. Gilman that
17 the thrust of your email is you don't agree with what Unz is
18 saying, right?

19 **A.** I don't take the question of the data on directly in that
20 email. I introduce some variables that I think would make it
21 hard to interpret them very simply. I certainly don't
22 provide other data that are better or more accurate.

23 **Q.** I perhaps made the question a little bit more complicated
24 than I should.

25 You don't agree with the thesis of the Unz article,

1 do you?

2 **A.** No, I don't.

3 **Q.** Right. And now I want to clear up something that's in
4 the email.

5 It says, "The only numbers we disclose to the
6 public are in our regular press releases, and we furthermore
7 provide to IPEDS and to the census bureau and related federal
8 offices. None of them would support the more crazy
9 speculations here, though some of it is correct."

10 And I wanted to give you an opportunity and maybe
11 the next couple sentences would help to explain what you
12 thought was correct about the Unz article.

13 **A.** You know, I actually don't remember it. I do remember it
14 was a busy time, and I remember reading this quite quickly.
15 I probably should not have seemed to confirm that it was
16 correct. I did say that.

17 **Q.** Thanks for that clarification. I want to focus you on
18 the paragraph above where you say, "One can argue endlessly,
19 and people do, about the criteria they wish to use for
20 Harvard admission."

21 Do you see that?

22 **A.** Yes, I do.

23 **Q.** Sorry. Were you finished?

24 **A.** Yes.

25 **Q.** You said several times that many, many people attempt to

1 lecture Harvard about how they should be deciding who gets
2 in. I think you said that several times, haven't you?

3 **A.** Yes, I think I have.

4 **Q.** Do you consider Students for Fair Admissions to be
5 lecturing Harvard about how it should do its admissions
6 process?

7 **A.** I'm not sure that I would be quick to use the word
8 "lecturing," but I do know that people have various opinions.

9 **Q.** And you say, "As you know, these criteria have also been
10 of interest to the OCR and the courts."

11 Do you see that?

12 **A.** Yes.

13 **Q.** And the OCR refer to the Office of Civil Rights, right?

14 **A.** Yes.

15 **Q.** And down at the bottom it says, "And we have been
16 examined by OCR most fully about 22 years back when we had a
17 full compliance review about Asian-American bias which
18 resulted in a very gratifying finding of approbation. It
19 appears that that chapter is known to the author."

20 Do you see that?

21 **A.** Yes.

22 **Q.** One of the reasons you were comfortable conveying to
23 Mr. Gilman that you thought little of the Unz allegations was
24 that OCR had cleared Harvard previously, right?

25 **A.** That was part of my context, yes.

1 **Q.** And you frequently relied on the OCR investigation in
2 discussing the question of Asian-American discrimination with
3 others internally to Harvard and externally. Is that fair?

4 **A.** Yes. From time to time I do.

5 **Q.** I'd like you to turn now to Plaintiff's Exhibit 225.
6 Plaintiff's Exhibit 225 is another email chain on which you
7 are participating. Do you see that?

8 **A.** Yes.

9 MR. MORTARA: We are going to offer
10 Plaintiff's 225.

11 MR. LEE: Same thing. Second page has hearsay
12 embedded in the email. I assume it's not being offered for
13 its truth.

14 MR. MORTARA: It is not.

15 THE COURT: Okay. With that caveat, it's admitted.
16 (Plaintiff Exhibit No. 225 admitted.)

17 BY MR. MORTARA:

18 **Q.** And it starts off with an email from our previous
19 participant, Robert D. Do you see him?

20 **A.** I do.

21 **Q.** And he writes to Kathryn Vidra. Who is she?

22 **A.** She is a colleague of mine who is in financial aid and
23 admissions and may have, although I can't be certain, been an
24 admissions area person for some area that this Robert D is
25 concerned. She knows him somewhere, but she's a colleague of

1 mine, a senior colleague of mine in the admissions office.

2 **Q.** This is occurring in December 2012. Do you see that?

3 **A.** Yes.

4 **Q.** Is it a fair characterization to say Robert is emailing
5 Ms. Vidra, again passing along the Unz article and asking
6 questions?

7 **A.** Yes.

8 **Q.** And then Ms. Vidra forwards the email to you and Dean
9 Fitzsimmons. It says, "Hi, WRF" --

10 That's Dean Fitzsimmons, right?

11 **A.** Yes.

12 **Q.** -- "/Marlyn. Do we have a response? Thanks for any
13 advice."

14 Do you see that?

15 **A.** Yes.

16 **Q.** You don't have any reason to doubt you got this email,
17 right?

18 **A.** I have no reason to doubt that.

19 **Q.** And then at the top is your response which also copies
20 Dean Fitzsimmons, right?

21 **A.** Yes.

22 **Q.** Do you see that? And it says, "Kitty, I have been
23 telling people that that set of views is nothing new, etc. I
24 often mention that we have had opportunities to show the OCR,
25 the courts, and others how our process works and that the OCR

1 has found us in compliance with the law and with general
2 principles of fairness."

3 Do you see that?

4 **A.** I do.

5 **Q.** And again, there you're mentioning the Office of Civil
6 Rights review, right?

7 **A.** Yes.

8 **Q.** And down below it says, "Fitz may have more specific
9 talking points to offer, but I have found that a pretty
10 simple response seems to shut up anyone not already loaded
11 for bear, and one can do little with the latter except point
12 out that many people have views about how we should do
13 admissions."

14 Do you see that?

15 **A.** I do.

16 **Q.** Did you ever see any talking points that Dean Fitzsimmons
17 drafted in response to the Unz article?

18 **A.** Did I ever see any? I don't remember when or what they
19 were, but I think yes, I did.

20 **Q.** Now I want to talk to you about some correspondence that
21 you were involved with with somebody from outside of Harvard.
22 And I'm going to use Plaintiff's Exhibit 279 which is in your
23 binder.

24 And you recognize this letter to Drew Faust, right,
25 Director McGrath?

1 **A.** I'm looking at it. If I could have just a moment. I'm
2 sorry. I'm slow here. I want to be sure that --

3 MR. MORTARA: Your Honor, could we have an
4 afternoon break? Because now would be a perfect time.

5 THE COURT: I could use the break myself. So why
6 don't we take a 10- or 15-minute break. What do you want?

7 MR. MORTARA: 15 would be great.

8 THE COURT: Five past 3:00.

9 MR. LEE: Your Honor, how late are we going today?

10 THE COURT: We've done a lot today. So I am
11 available until 4:00, but I'm happy to stop earlier if you
12 want.

13 MR. MORTARA: I've got about, I'm going to guess,
14 25 to 30 minutes left.

15 MR. LEE: I just have to talk to her about her
16 expectations. She was supposed to get on and off today. It
17 looks like that's not going to happen.

18 THE COURT: He says he has another -- say he goes
19 to something like 3:30. How long do you all think you have
20 with her.

21 MR. LEE: Can I talk to her?

22 THE COURT: Yes. Let me tell you this: If her
23 schedule, if it means something to her to get off today and
24 we take a break now, I can sit past 4:00.

25 MR. LEE: Let me talk to her and I'll see what I

1 can do.

2 MR. MORTARA: Your Honor, just for the record, if
3 we can clear up right now, I'd want to move P257 into
4 evidence. That was the Z list email.

5 THE COURT: 257, the emails between her and her
6 daughter.

7 MR. LEE: I'm not sure it's relevant, but we'll
8 deal with it on cross.

9 THE COURT: He's just moving to admit it. Now it's
10 been shown and discussed. So I think the prudent thing is to
11 admit it.

12 MR. LEE: Fine.

13 THE COURT: I can go as long as we need to today if
14 it's important for her to get off the stand today.

15 MR. LEE: Can I confer with her about that at the
16 break?

17 THE COURT: Yes. Do it at the break and we'll come
18 back at five past, which is now 13 minutes.

19 (Court recessed at 2:53 p.m.)

20 (Plaintiff Exhibit No. P257 admitted.)

21 BY MR. MORTARA:

22 Q. Hello again, Director McGrath. When we left, I had asked
23 you to turn to --

24 THE COURT: Hold on one a second.

25 What do you want to do about scheduling?

1 MR. LEE: Your Honor, I think we'll see how long
2 SFFA goes. Then I'll make a judgment.

3 THE COURT: That's fine. And as I say, I have some
4 flexibility. I'll say 5:00 is my outside limit or Joan will
5 shoot me.

6 MR. LEE: I think the likelihood is I won't be able
7 to get through it, but I'll tell you that as soon as I get
8 up. If I can't, we'll suspend at 4:00. I think she can come
9 back Monday afternoon.

10 THE COURT: As I say, I'm happy to go another
11 couple of hours if that makes anybody's life easier.

12 BY MR. MORTARA:

13 Q. Dr. McGrath, before you left, I asked you to turn to
14 P279, which is a letter from a redacted name to Draw Faust.

15 And my first question is, do you recall having this
16 letter in your files?

17 A. From preparation for the trial, I recall the letter. I
18 mean I've seen the letter. I don't recall it, but I see it
19 now and I've seen it in preparation.

20 Q. And I'm just going to point out some elements of the
21 letter. Just first, you understand that this is a letter
22 from what appears to be a self-identified Asian-American high
23 school student to President Faust on the subject the Unz
24 article and the possibility that Harvard was discriminating
25 against Asians, correct?

1 **A.** Yes. I see that that's the topic.

2 **Q.** It says, "My name is" -- redacted -- "and I am a junior
3 at" -- redacted. "Part of our AP English curriculum includes
4 drafting an activism letter inspired by Thoreau's 'Civil
5 Disobedience' and Dr. Martin Luther King Jr's 'Letter From
6 Birmingham Jail.' I have chosen to write to you, the
7 president of the Harvard Corporation, because I believe you
8 may have some authority and can address my concerns about
9 inequality in Ivy League admissions."

10 Do you see that?

11 **A.** Yes.

12 **Q.** And it goes on to discuss concerns about Asian-American
13 discrimination, doesn't it?

14 **A.** Yes.

15 **Q.** And this is from April 2014, correct?

16 **A.** Yes.

17 **Q.** Would you agree with me this is a very well-written and
18 thoughtful letter?

19 **A.** Yes.

20 **Q.** And you were involved in discussing the response to this
21 letter, correct?

22 **A.** Yes.

23 MR. MORTARA: And I would offer Plaintiff's 279,
24 Your Honor.

25 MR. LEE: I'd object to it as it's offered for its

1 truth. The fact that it was sent is fine.

2 MR. MORTARA: I'm not offering it for the truth.

3 THE COURT: That's fine.

4 BY MR. MORTARA:

5 Q. Can you turn now to Plaintiff's 287?

6 A. Yes.

7 Q. This is an email chain which includes Robin Bernhard and
8 you and several others. Do you see that?

9 A. Yes.

10 Q. And it's also from April 2014, correct?

11 A. Yes.

12 Q. Do you recognize it?

13 A. I do from preparation for the trial.

14 MR. MORTARA: Your Honor, we offer Plaintiff's 287.

15 MR. LEE: No objection.

16 THE COURT: Admitted.

17 (Plaintiff Exhibit No. 287 admitted.)

18 BY MR. MORTARA:

19 Q. And on the second page you can see the first email is
20 from Robin Bernhard to Jeff Neal. You ultimately are copied
21 in on the chain. The subject is, "Letter to President Faust
22 from high school student re admissions diversity, April 14."

23 Do you see that?

24 A. Yes, I do.

25 Q. "Dear Jeff. I'm working on a response to the attached

1 letter, and Marilyn McGrath suggested that I get in touch
2 with you as you are already dealing with the issue" --
3 blank -- "writes about."

4 Redacted there is, I believe, the student's name.
5 Do you see that?

6 **A.** Yes.

7 **Q.** You suggested to Robin Bernhard that she get in touch
8 with Jeff Neal about how to respond to this high school
9 student's essay and letter to President Faust on
10 Asian-American discrimination?

11 **A.** That's what this is, I have no reason to doubt it.

12 **Q.** And Jeff Neal, he works in public relations for Harvard,
13 right?

14 **A.** He did, yes, at this time.

15 **Q.** And now you can see Mr. Neal's response, which starts on
16 the previous page. And I'll split it over two on my screen
17 here.

18 Do you see the response from Mr. Neal?

19 **A.** Yes, I do.

20 **Q.** At the top he says, "Hi, Robin. This is a tough one.
21 Seems extraordinarily well-written for a high school
22 student."

23 Do you understand this to be a compliment to the
24 letter?

25 **A.** I'm only seeing what I'm reading. I have no idea what he

1 meant. I can't read his mind.

2 **Q.** And you see down at the bottom he says, "Frankly, I worry
3 that this letter is a bit of a straw man for the folks
4 seeking to stage anti-affirmative action lawsuit against
5 Harvard."

6 Do you see that?

7 **A.** Yes, I do.

8 **Q.** Did you have those same feelings, or did you take the
9 letter at face value?

10 **A.** I don't remember. I probably took it at face value.

11 **Q.** And then in the middle you see Mr. Neal making a comment,
12 "More broadly, Harvard was, in fact, investigated by OCR for
13 just this allegation in the 1980s."

14 Do you see that?

15 **A.** Yes.

16 **Q.** That's the Office of Civil Rights again, right?

17 **A.** I assume so, yes.

18 **Q.** "OCR found that adjusting for legacy and athletics, the
19 percentage of Asian-American students admitted to Harvard
20 College was in line with what would be expected."

21 Do you see that?

22 **A.** I do.

23 **Q.** "That is not a fact that we point to regularly. Largely
24 many folks would also disagree with our policies around
25 admitting athletes and giving a tip to sons and daughters of

1 alums."

2 Do you see that?

3 **A.** Yes.

4 **Q.** It goes on to say, "But it is true that we have been
5 exonerated of these charges that our athletic and legacy
6 admissions policies are perfectly legal and nothing has
7 substantially changed since then."

8 Do you see that?

9 **A.** Yes.

10 **Q.** And here, I just want to ask you about "That is not a
11 fact that we point to regularly."

12 Is this an example of what I was getting at in the
13 beginning of our discussion together about how Harvard talks
14 about its admissions process but sometimes doesn't highlight
15 certain features of it?

16 **A.** I have no idea whether this is an example of that.

17 **Q.** When you have spoken about Harvard's admissions process,
18 for instance when you were at the Sutton Trust in England,
19 did you talk about Harvard's preferences for legacies?

20 **A.** I don't remember. I may have.

21 **Q.** Do you know whether Mr. Neal had seen anything from the
22 Office of Institutional Research on Asian-American
23 discrimination when he was writing these things in 2014?

24 **A.** I'm sorry. I don't know that either.

25 **Q.** Now, we're just going to get to the part where you get

1 directly involved in the chain. The bottom email comes from
2 Robin Bernhard. Who's she?

3 **A.** She was in the president's office, and she was one of the
4 personnel who handled a good deal of President Faust's
5 correspondence.

6 **Q.** And she says, "Dear Marlyn. I'm writing to share Jeff
7 Neal's response below with you in case" -- blank -- "contacts
8 admissions after she gets our letter. I'll also BCC you on
9 the outgoing."

10 Do you see that?

11 **A.** I do.

12 **Q.** You have no reason to doubt you were blind-carboned on
13 the outgoing, right?

14 **A.** I have no reason to doubt that.

15 **Q.** In the middle, I want to get to this. You say, "Sounds
16 just right. No going on the record. And we are always happy
17 to give our own dumb answer if she contacts us. Thanks very
18 much for your care with this. Best, M."

19 Do you see that?

20 **A.** I do.

21 **Q.** And by "dumb answer", you don't mean stupid. You mean a
22 stock answer to these types of inquiries?

23 **A.** I mean our simple, basic answer, yes. Stock answer, yes.

24 **Q.** Form or stock answer?

25 **A.** Probably.

1 **Q.** Did that stock answer when you gave it sometimes include
2 a mention of the OCR investigation by the Department of
3 Education?

4 **A.** Yes. And it may in any stock answer. It certainly was
5 an available idea that was helpful to us.

6 **Q.** I want you now to turn to Plaintiff's Exhibit 265.

7 MR. MORTARA: Your Honor, did I offer 287?
8 Ms. Hacker said I did, so I did.

9 THE COURT: Yes, you did.

10 BY MR. MORTARA:

11 **Q.** Plaintiff's Exhibit 265 is another email course exchanged
12 between you and your daughter, correct?

13 **A.** Yes.

14 **Q.** You were e-mailing your daughter here in her capacity as
15 an alumni interviewer for Harvard, correct?

16 **A.** Yes.

17 MR. MORTARA: Your Honor, we offer Plaintiff's 265.

18 MR. LEE: No objection.

19 THE COURT: Admitted.

20 (Plaintiff Exhibit No. 265 admitted.)

21 BY MR. MORTARA:

22 **Q.** And here you are forwarding to your daughter an email,
23 which you see at the bottom, from the Utah schools committee.
24 Do you see that?

25 **A.** I do.

1 **Q.** Let's just take a look. This is a January 25, 2014, to
2 Ian Anderson, copy -- is that your email address?

3 **A.** Yes.

4 **Q.** Who is Ian Anderson other than the lead singer of Jethro
5 Tull?

6 **A.** That's new information to me. The information that I
7 have is my Ian Anderson is my colleague who at this time was
8 serving as area person for the state of Utah.

9 **Q.** All right. And what happens here is the Utah schools
10 committee sends you a list of applicants that they have
11 ranked in their order of perception of the applicant's
12 quality for admission to Harvard, correct?

13 **A.** Yes.

14 **Q.** And we can see that there's a lot of redactions here.
15 The names are redacted, but the applicants are grouped. Do
16 you see that?

17 **A.** Yes.

18 **Q.** And down below, the committee makes special
19 recommendation of several specific students. Do you see
20 that?

21 **A.** Yes.

22 **Q.** And you forwarded on to your daughter. "Sending this
23 along for your amusement. Pure Utah."

24 Do you see that?

25 **A.** Yes.

1 **Q.** What was so funny about this?

2 **A.** It's part -- this exchange was part of a continuing
3 discussion I've had with the people in Utah actually who run
4 a very elaborate ranking process and a couple of other
5 schools committee chairs around the country who have been
6 trying to learn from Utah's experience. Elizabeth, my
7 daughter, was one of them. And I thought it was a good
8 example of what the end product of that was. So there was a
9 certain continuation of a correspondence in this exchange.

10 **Q.** And your daughter responds to you, "Ha, ha, ha. Very
11 thorough," which you probably took to be a recognition of
12 that ongoing conversation you were having with her, right,
13 about the thoroughness?

14 **A.** Yes, I think so.

15 **Q.** And then it says, "I also love that the top-tier list is,
16 as you've told me before, all Asians except for a couple."

17 Do you see that?

18 **A.** I do.

19 **Q.** You have remarked to your daughter that the Utah
20 committee ranks as their top-tier candidates predominantly
21 Asians, correct?

22 **A.** I probably have. I know that I have pointed out
23 repeatedly that the group from Utah is more diverse than
24 people expect it will be.

25 **Q.** But you know that, for instance, Salt Lake City has a

1 significant Asian population, don't you?

2 **A.** I do.

3 **Q.** But you thought your daughter would find it amusing, in
4 part, that the Utah committee had put all Asians at the top
5 of their list?

6 **A.** I thought it would be notable, yes.

7 **Q.** Why did you think it would be okay to remark to your
8 daughter on the ethnicity of the top tier of the Utah
9 committee recommendations based exclusively on their race?

10 **A.** Because it confounds the stereotype that many people have
11 of the population of Utah.

12 **Q.** Could you now turn to Plaintiff's Exhibit 461.

13 **A.** Yes.

14 **Q.** In April of 2012, you were involved in responding to
15 another letter sent to President Faust, weren't you?

16 **A.** Yes.

17 **Q.** And before we look at your response which is here in
18 Plaintiff's Exhibit 461, the actual letter is also in the
19 back. It comes after your response, attached to an email
20 from Andrea Balian.

21 Do you see that?

22 **A.** Yes.

23 **Q.** And so Ms. Balian, who is she?

24 **A.** She's my staff assistant.

25 **Q.** And you were sent this by Rachel Partin. Do you see

1 that?

2 **A.** Yes.

3 **Q.** From the office of the president?

4 **A.** Yes.

5 **Q.** It says, "Hi, Marlyn. President Faust received the
6 attached letter from an alumnus regarding admissions
7 practices. Given the nature of the suggestions, I was
8 wondering if your office wouldn't mind responding on behalf
9 of the president. Let me know what you think."

10 Do you see that?

11 **A.** I do.

12 **Q.** What follows from that is a letter from a fairly elderly
13 alum of Harvard, correct?

14 **A.** Yes.

15 **Q.** And you recognize all these documents, both your response
16 the email and the letter from the alum?

17 **A.** I recognize them from preparation for this trial.

18 MR. MORTARA: Your Honor, we move Plaintiff's 461.

19 MR. LEE: As long as it's not for the truth. The
20 Harvard response is fine. The letter from the alum is
21 definitely not for its truth.

22 THE COURT: Yes.

23 (Plaintiff Exhibit No. 461 admitted.)

24 BY MR. MORTARA:

25 **Q.** Let's turn to the letter from the alum. His name has

1 been redacted. It's dated April 4, 2012. Do you see that?

2 **A.** Yes.

3 **Q.** It's to President Faust. And the writer first says that
4 he's from the Harvard class of 1942. Do you see that?

5 **A.** Yes.

6 **Q.** And on the second page -- he has a variety of suggestions
7 about Harvard in the two-page letter, right?

8 **A.** He does, yes.

9 **Q.** And on the second page, I want to blow up some of the
10 suggestions he has. And he says he's got -- "The reason for
11 my letter is to make comments with regard to the college's
12 admissions policy."

13 Do you see that?

14 **A.** Yes, I do.

15 **Q.** And down below he says, "Another aspect of the admissions
16 policy should, in my mind, be based on informal quotas."

17 Do you see that?

18 **A.** Yes.

19 **Q.** And he says, "I think it is also important to have a
20 quota based on religious affiliation and skin color."

21 Do you see that?

22 **A.** Yes.

23 **Q.** And in a sentence prior to that he says, "I would limit
24 the number of Japanese students to a certain percentage or
25 number."

1 Do you see that?

2 **A.** Yes.

3 **Q.** And he says, "None of this, of course, has to go beyond
4 the confines of the dean's office."

5 That's the suggestion from this alum?

6 **A.** Yes.

7 **Q.** Then he says, "The last time I was in Cambridge it seemed
8 to me that there were a large number of Oriental students,
9 for example. I think they probably should be limited to
10 5 percent, as should other criteria."

11 Do you see that?

12 **A.** I do.

13 **Q.** You would not call Asian-American students at Harvard
14 Oriental students, would you?

15 **A.** I never have. I wouldn't.

16 **Q.** Neither would I, if I weren't reading this. So we'll
17 stop doing that now.

18 I want to talk about how you responded to this alum
19 at President Faust -- was it at President Faust's direction
20 or her office's direction that you responded?

21 **A.** Yes.

22 **Q.** And I want to talk about your response. Here it is.
23 April 19, 2012.

24 And you start off with, "President Faust has asked
25 me to respond to your April 4 letter in which you offer many

1 thoughtful observations about Harvard College students and
2 the results of the admissions process."

3 Do you see that?

4 **A.** I do.

5 **Q.** And this wasn't your true thinking about it. You were
6 being polite, right?

7 **A.** Thank you. Yes, it was a polite response to an elderly
8 alumnus.

9 **Q.** And elderly alumnus making what we I think can all agree
10 are shocking suggestions, correct?

11 **A.** Yes.

12 **Q.** And at the end of the letter you say, "All of us at
13 Harvard appreciate your thoughtful letter, as well as your
14 loyalty over the years."

15 Do you see that?

16 **A.** Yes, I do.

17 **Q.** Ms. McGrath, I want to explore this only in minor detail.
18 In your view, this was an appropriate response, correct?

19 **A.** I thought it was of the polite response that I would
20 send.

21 **Q.** I want to talk about this. This is just something that I
22 want to just ask you, and I want to do it -- I'm going to try
23 and do it this way: Do you think in our culture we're more
24 polite about stereotypes about Asians and Asian
25 discrimination than we would be about stereotypes or comments

1 made about other minority groups? Do you think that that's
2 true in American society?

3 **A.** I don't.

4 **Q.** You think we react just as negatively to the use of
5 "Oriental" as we would to the use of the N word?

6 **A.** Yes.

7 **Q.** Would this have been an appropriate response if the alum
8 had complained about the number of N words on campus, to
9 thank him for his thoughtful comments?

10 **A.** I might have sent the same response. I don't know that
11 it would be a more or less appropriate response.

12 **Q.** Would you have sent the same response if the alum had
13 complained about the number of Jewish students on campus?

14 **A.** I can't tell you what I would have done, but I don't know
15 that I wouldn't have also tried to end the correspondence
16 with a perhaps too-polite response.

17 **Q.** Do you think that we as a society are less sensitive to
18 stereotypes or archaic words being used to describe
19 Asian-Americans than we are to other minority groups?

20 **A.** I don't think that.

21 **Q.** I'm going to shift focus now. I think you've told us
22 about a lot of things that can go in the personal rating in
23 your deposition, right? And I want to talk to you about some
24 of those.

25 You weren't here, Director McGrath, yesterday,

1 where we had an episode where I had to walk across the
2 courtroom, and I promised the court that I was going to use
3 the computer because my handwriting was terrible. It was a
4 big waste time in terms of the walking back and forth, at
5 least.

6 I want to ask you if the following list of things
7 are included in analysis of the personal rating. All right?

8 **A.** Sure.

9 **Q.** Is like likability something you look at for the personal
10 rating?

11 **A.** That might be a factor.

12 **Q.** What about whether that person is a good person to be
13 around?

14 **A.** That's possibly part of the consideration.

15 **Q.** You told us it was part of the consideration, right?

16 **A.** Yes.

17 **Q.** What about integrity?

18 **A.** Yes. Very important.

19 **Q.** And helpfulness?

20 **A.** Yes.

21 **Q.** What about courage?

22 **A.** Yes.

23 **Q.** And kindness?

24 **A.** Yes.

25 **Q.** And those are some of the things you told us were

1 involved in the personal rating in your deposition, right?

2 **A.** Yes.

3 **Q.** Now, I know you told us that a person's race or ethnicity
4 should not be included in one of the factors that would weigh
5 into the personal rating, right?

6 **A.** Yes.

7 **Q.** Your words were "should not," right?

8 **A.** Should not in itself.

9 **Q.** You also told us that race or ethnic background is not
10 supposed to be considered in assessing the scores in any of
11 these areas, right?

12 **A.** Yes.

13 **Q.** Now I'm going to ask you to refer to Plaintiff's
14 Exhibit 1.

15 MR. MORTARA: Your Honor, we're going to mark this
16 as plaintiff's demonstrative 22. We're going to provide a
17 copy just so it's a record of what I put up on the
18 demonstrative.

19 THE WITNESS: I'm sorry. Which one are you
20 directing me to?

21 BY MR. MORTARA:

22 **Q.** Plaintiff's Exhibit 1.

23 **A.** I got it.

24 **Q.** Right at the beginning.

25 **A.** Yes.

1 **Q.** This is your reading guidance, right?

2 **A.** That's what it's called. It's called "Reading
3 Procedures." It really, in fact, is, as you will have seen,
4 I think, a guide to coding. It's what you take from reading
5 the application and make sure it gets put into the electronic
6 records system. But it's called "Reading Procedures."

7 **Q.** And it's got a little bit more than that.

8 **A.** It does. But its fundamental thing is it's a how-to
9 note.

10 **Q.** And also it's got some guidance on how to score things?

11 **A.** Yes, it does.

12 **Q.** And you're responsible for the content of this document
13 ultimately?

14 **A.** Yes, I am. A group of us develop it every year, change
15 it every year.

16 **Q.** Please go to the section of the personal rating that's on
17 page 5.

18 **A.** Yes.

19 **Q.** Does it say anywhere in this document that race should
20 not be used in assessing the personal rating?

21 **A.** I do not think so.

22 **Q.** Now I've got a broader question.

23 Does it say anywhere in the admissions office, in
24 any written form, training material, memo, email, or any kind
25 of writing down to a Post-it on the coffee maker, that race

1 should not be used in the personal rating? Is it written
2 anywhere?

3 **A.** In written form, no. It is the subject of a great deal
4 of discussion and attention in our training process.

5 **Q.** Did you finish, ma'am? Sorry.

6 **A.** I'm finished.

7 **Q.** And we talked about OCR and your reliance on OCR in
8 communications several times today, right?

9 **A.** Yes.

10 **Q.** You reviewed the OCR findings when they cleared Harvard
11 in 1990, correct?

12 **A.** Yes.

13 **Q.** Please turn to Plaintiff's Exhibit 555. Are you there,
14 ma'am.

15 **A.** I am.

16 **Q.** Plaintiff's Exhibit 555 is the statement of findings.
17 You're familiar with this document, right?

18 **A.** Yes.

19 **Q.** And over on page 15 I want you to focus on the statement
20 at the bottom that is now not displaying properly. Oh.

21 **A.** Yes.

22 **Q.** We'll do our best here. There we go. And it carries
23 over -- putting ing on the screen. Oh, I did it again. Not
24 as good as Ms. Hacker with this thing. There we go.

25 There's a statement highlighted on the screen. I'm

1 going to read the whole thing. This is part of the OCR
2 investigation. OCR actually interviewed a bunch of people
3 that worked in the admissions office, right?

4 **A.** Yes, they did.

5 **Q.** Were you interviewed?

6 **A.** Yes, I think I was.

7 **Q.** And here's one of OCR's findings. "We found that the
8 readers had several different views as to where and whether
9 Asian-American ethnicity was given positive weight or a tip
10 in the admissions process. Some readers explained that when
11 ethnicity was deemed to be a significant factor in an
12 application, it was reflected in the POR and during
13 discussions at subcommittee and committee meetings."

14 Do you see that?

15 **A.** I do.

16 **Q.** And I understand that to be Harvard's position about how
17 it works today, is that right, that ethnicity or race is
18 reflected in the preliminary overall rating and in
19 discussions?

20 **A.** Yes. That it may be, yes.

21 **Q.** Then it says, "Other readers indicated that ethnicity was
22 a factor considered throughout the entire admissions process.
23 They stated that it could be reflected in the four reader
24 rating areas as well as in the POR and during the
25 subcommittee and committee meeting discussions."

1 You see that, right?

2 **A.** I see that, yes.

3 **Q.** And that is in part a reflection of what you say should
4 not happen which is people using race in assigning the
5 personal rating, correct?

6 **A.** Yes.

7 **Q.** Now, do you think -- after you read the OCR findings that
8 maybe it would have been a good idea to develop written
9 guidance so you could ensure the consistency of people using
10 race in Harvard's admissions process?

11 **A.** I did not I think react at the time nor would I now to
12 think that the right remedy for that is more written
13 guidance.

14 **Q.** Did you suggest the development of written guidance?

15 **A.** I don't believe I did. I don't remember.

16 **Q.** Did anyone?

17 **A.** I don't remember following this.

18 **Q.** Now, there is approximately 40 members of the admissions
19 committee year in and year out; is that right?

20 **A.** Yes.

21 **Q.** You do the hiring in the admissions office, right?

22 **A.** Yes.

23 **Q.** And a lot of your hires are recent college graduates,
24 right?

25 **A.** Yes.

1 **Q.** In fact, most of your hires in recent years have been
2 recent college graduates?

3 **A.** Yes. The majority probably these days.

4 **Q.** Now, since you're in charge of hiring, can you give the
5 Court an idea of what the turnover is like in the people that
6 read applications?

7 **A.** Yes. We have some very long serving members of our
8 committee. We also have a cohort of more junior people who I
9 would say typically stay three to six or seven years. It's
10 hard to generalize, but there's a range.

11 **Q.** I want to go through -- I want to do a who's still left
12 from the spring of 2011 with you. If you turn to defendant's
13 Exhibit -- it's not a memory test, Director. Don't worry.

14 **A.** Good. Because I won't get it right.

15 **Q.** Defendant's Exhibit 25, we're going to go through some
16 together. And the first thing on defendant's Exhibit 25 is
17 actually a letter.

18 **A.** I'm sorry. I want to make sure. Defense 25. Yes.

19 **Q.** I'm trying to move it along because I know you want to be
20 somewhere and I want to be somewhere. I'm sorry, Director.
21 Please take your time.

22 **A.** You're sending many he to D25.

23 **Q.** D25.

24 **A.** I have that.

25 **Q.** The first thing is actually a letter. This document is a

1 massive collection of things. I'm just going to zoom through
2 it. It's actually I think from your files and consists of
3 several manila folders. Do you have recognize some of these
4 documents?

5 **A.** Yes, I do. And from preparation for this trial.

6 MR. MORTARA: Your Honor, we're going to offer
7 Defendant's 25.

8 MR. LEE: It's in evidence already.

9 MR. MORTARA: Sorry.

10 THE CLERK: No.

11 MR. LEE: Okay. Then no objection.

12 (Plaintiff Exhibit No. DX 25 admitted.)

13 BY MR. MORTARA:

14 **Q.** I'd like you to find, it make take you a little while,
15 page 117 of this file of yours.

16 **A.** Can you tell me on what part of the page the number
17 appears?

18 **Q.** It's at the bottom, the very bottom. Do you see DX 025
19 dot and there's a number.

20 **A.** What's the last number?

21 **Q.** 117.

22 **A.** That's fine. I'll have it in a moment. I have it now.
23 Thank you.

24 **Q.** What you see here is Admissions Committee Members Spring
25 2011.

1 **A.** Yes. Good. Yes.

2 **Q.** I want to go through some of these with you. And we
3 don't have to go through them one by one. I've tried to do
4 my best to identify who's there and who isn't. Ian Anderson.
5 He was on the committee in 2011, correct?

6 **A.** Yes.

7 **Q.** He's still at the admissions office, correct?

8 **A.** Yes.

9 **Q.** Roger Banks was on the admissions committee in 2011,
10 correct?

11 **A.** Yes.

12 **Q.** He's still at the admissions office, correct?

13 **A.** Yes.

14 **Q.** Valerie Bielensen was on the committee in 2011 but is no
15 longer at Harvard admissions, correct?

16 **A.** Correct.

17 **Q.** Okay. I'm going to cross her name off. Jessica Clark
18 was on the committee in 2011. She is still there, correct?

19 **A.** Yes.

20 **Q.** Now we go through Monica Del Toro Brown was on the
21 committee in 2011 but is no longer there, correct?

22 **A.** Correct.

23 **Q.** The same is true of Sarah Donahue, no longer there,
24 recently retired?

25 **A.** Yes.

1 Q. And then Devery Doran also no longer there?

2 A. Correct.

3 Q. Danielle Early also no longer there?

4 A. Correct.

5 Q. Precious Eboigbe also no longer there?

6 A. Correct.

7 Q. Ellis Eckhard also no longer there?

8 A. Correct.

9 Q. Bronwyn Evans also no longer there?

10 A. Correct.

11 Q. Now we'll turn to the second page. Okay?

12 A. Yes.

13 Q. At the top is David Evans. In 2011 according to this
14 chart he had been there for 41 years; is that right?

15 A. Yes.

16 Q. And he's still there, isn't he?

17 A. He is.

18 Q. Still at the admissions office. He was around for the
19 OCR investigation, correct?

20 A. Yes.

21 Q. Chad Faeber, he's no longer there, correct?

22 A. Yes.

23 Q. William Fitzsimmons, who is he?

24 A. I think you met him yesterday or I should say Monday.

25 Q. That was my poor attempt at a joke. Natalie Galindo,

1 she's no longer there?

2 **A.** Correct.

3 **Q.** Jennifer Gandi no longer there?

4 **A.** Correct.

5 **Q.** Rosemary Green, she's no longer there, but she was around
6 for the OCR investigation, correct?

7 **A.** Correct.

8 **Q.** Sally Harty is still there, correct?

9 **A.** Yes.

10 **Q.** She was around for the OCR investigation?

11 **A.** Yes.

12 **Q.** I'm going the wrong way. Marcy Homer is no longer there?

13 **A.** Correct.

14 **Q.** Kaitlin Howrigan is no longer there?

15 **A.** Correct.

16 **Q.** Janet Irons still works there, correct?

17 **A.** Yes.

18 **Q.** And she was around for the OCR investigation, right?

19 **A.** Yes.

20 **Q.** Jonathan Kaufman and Charlene Kim still work in the
21 office, correct?

22 **A.** Yes.

23 **Q.** On the next page we start off at the top, Amy Crilcaldi,
24 she's no longer there?

25 **A.** Correct.

1 Q. Sean Logan is no longer there?

2 A. Correct.

3 Q. Christopher Looby is still working at the admissions
4 office today?

5 A. Yes.

6 Q. Mary Magnuson is still at the admissions office?

7 A. Yes.

8 Q. Christine Mascolo is still at the admissions office?

9 A. Yes.

10 Q. Then there's you?

11 A. Yes.

12 Q. Sophia Meeze is still at the admissions office?

13 A. Yes.

14 Q. She's gone, I think, sorry.

15 A. She's gone, yes.

16 Q. My fault.

17 A. She's been gone.

18 Q. Dwight Miller is still at the admissions office and has
19 been there for 44 years in the spring of 2011; is that right?

20 A. That's right.

21 Q. And he was around when the OCR investigation happened,
22 correct?

23 A. He was.

24 Q. Lucerito Ortiz is no longer there?

25 A. Right.

1 **Q.** The Elizabeth Pabst is no longer there?

2 **A.** Right.

3 **Q.** James Pautz is no longer there?

4 **A.** Right.

5 **Q.** And on the last page Rick Rice is still at the office,
6 correct?

7 **A.** He is.

8 **Q.** Margaret Swift is no longer there?

9 **A.** No longer.

10 **Q.** Kathryn Vidra had been there for 27 years in 2011. She's
11 still there, correct?

12 **A.** Yes.

13 **Q.** And she was around for the OCR investigation, right?

14 **A.** She was.

15 **Q.** And Paris Woods is no longer with the office, correct?

16 **A.** Yes.

17 **Q.** So we've been through the whole list --

18 **A.** And Robin Worth, the last person.

19 **Q.** Sorry. Robin Worth is it still there?

20 **A.** Yes.

21 **Q.** Sorry. We've been through the whole list. There's been,
22 would you agree, a fair amount of turn over in those seven
23 years. I think I counted 22 out of 39 people are no longer
24 there from seven years ago?

25 **A.** Right.

1 **Q.** You'd agree with me there's a fair amount of turnover,
2 right?

3 **A.** Yes.

4 **Q.** I just have a few questions. Going back to the first
5 page. Are you certain whether or not Precious Eboigbe was
6 using race in her assignment of the personal rating?

7 **A.** I cannot be certain of that.

8 **Q.** You also can't be certain whether Monica Del Toro-Brown
9 was using race in the personal rating?

10 **A.** I can't be certain. I have no reason to believe that in
11 either case.

12 **Q.** But you can't be certain, can you?

13 **A.** I can't.

14 **Q.** One of the reasons you can't be sure whether these
15 individuals and others considered race in the personal rating
16 is Harvard had no written guidance on whether to use race in
17 the personal rating?

18 **A.** No. The reason I can't be sure is that I haven't seen
19 evidence of it one way or another.

20 **Q.** You've been reading applications for nearly 40 years,
21 right?

22 **A.** Yes.

23 **Q.** Going back to our list of things you told us go into the
24 personal rating. In your experience do Asian-Americans as a
25 group lack attractive personal characteristics compared to

1 other applicants?

2 **A.** Not in my experience.

3 **Q.** And none of the characteristics that we've talked about
4 have any correlation with race, do they?

5 **A.** No. Not per se. They may be revealed in a racial
6 context, but they have nothing to do with race per se.

7 **Q.** None of these characteristics we've talked about have any
8 correlation with race, do they?

9 **A.** No.

10 **Q.** Thank you. I have no further questions, Director
11 McGrath.

12 MR. LEE: Your Honor, in answer to your question I
13 think what I'll do is start and then go until 4:00.

14 THE COURT: Okay. If you decide at 4 you're
15 feeling energized and wish to push on, just let me know.

16 MR. LEE: Okay.

17 THE COURT: I just missed some of these names.
18 Natalie Galindo still at the office?

19 THE WITNESS: No, she is not.

20 THE COURT: What about Marcy Homer?

21 THE WITNESS: She is not.

22 THE COURT: Irons?

23 THE WITNESS: Yes.

24 THE COURT: Kaufman?

25 THE WITNESS: Yes.

1 THE COURT: And Kim.

2 THE WITNESS: Yes.

3 THE COURT: Sorry. I just missed a couple.

4 THE WITNESS: Not at all. Thank you.

5 EXAMINATION

6 BY MR. LEE:

7 Q. Actually let me provide one more question. May I
8 proceed, Your Honor?

9 THE COURT: Yes.

10 BY MR. LEE:

11 Q. Mr. Mortara suggested Sally Donahue was no longer
12 involved in admissions; is that correct?

13 A. She has retired from her professional role. She will
14 help us in admissions not as a regular staff member, I think.
15 So I just let that go.

16 Q. And is she still reading folders?

17 A. I think she will be this fall.

18 Q. Now, Mr. Mortara began his conversation by suggesting,
19 and I have a quote, "I've read about a thousand of your
20 documents."

21 Do you remember he said that at the beginning?

22 A. Of my documents is what he said. I may have misheard.

23 Q. Documents. Now, let's see what he came up with after he
24 read these thousands of documents. He came up with PX257
25 which is an email chain between you and your daughter,

1 correct?

2 **A.** Correct.

3 **Q.** And he came up with PX265 which is another email with
4 your daughter, correct?

5 **A.** Correct.

6 **Q.** And he came up with a letter to a 90-year old alum who
7 was making completely inappropriate comments. That's what he
8 came up with, correct?

9 **A.** Yes. Correct.

10 **Q.** Let's talk about the three things he came up with from
11 these thousands of documents. The emails between you and
12 your daughter, do you recall PX257, the first one?

13 **A.** I'll have to remind myself which one it was.

14 **Q.** It would be on the screen.

15 **A.** 257. I'd rather look at the -- yes, I see it.

16 **Q.** This is a document he discussed with you about the Z list
17 email?

18 **A.** Yes. Yes.

19 **Q.** This email exchange between you and your daughter, did
20 you ever expect it to see the light of day in a federal
21 courthouse?

22 **A.** No, I did not.

23 **Q.** Now, does the email concern discrimination against any
24 Asian-American applicant at all?

25 **A.** Not that I can see.

1 **Q.** Does it concern an Asian-American applicant period?

2 **A.** Not that I can see.

3 **Q.** So that's number one of his list. Let's look at number
4 two, PX265.

5 **A.** Yes.

6 **Q.** Do you have that before you?

7 **A.** I do.

8 **Q.** This is another email with your daughter, correct?

9 **A.** Yes.

10 **Q.** And this is the one on the Utah schools committee,
11 correct?

12 **A.** Yes.

13 **Q.** And he asked you specifically about the word "amusement".
14 Do you recall that?

15 **A.** Yes.

16 **Q.** Were you criticizing or casting aspersions on any of the
17 applicants mentioned in those emails?

18 **A.** No, I was not.

19 **Q.** Did you criticize or cast aspersions on any individual
20 applicant in any of the two emails with your daughter?
21 That's a poor question because it has both.

22 Let's just stay focused on 265. Did you cast
23 aspersions or criticize any applicant in the emails that are
24 P265?

25 **A.** No.

1 **Q.** Do you understand that SFFA contends and has suggested
2 these emails somehow suggest that you have a bias against
3 Asian-Americans. Are you aware of that?

4 **A.** I'm aware of that.

5 **Q.** Is that true?

6 **A.** No.

7 **Q.** Now, let's look at his third document from your thousands
8 of documents. It's PX461. Do you have that?

9 **A.** I do.

10 **Q.** Now, this is a letter from an elderly alum, correct?

11 **A.** Yes.

12 **Q.** And do you condone his criticisms of different racial or
13 ethnic groups?

14 **A.** I do not.

15 **Q.** Do you condone his suggestion of quotas?

16 **A.** No.

17 **Q.** Do you condone the views he expressed about what the
18 Harvard campus should look like?

19 **A.** No.

20 **Q.** Would you tell us why you decided to give a 90-year old
21 alum a polite response rather than getting into a war of
22 words with him?

23 **A.** Because he is a 90-year old alum, and I thought it was a
24 polite institutional thing to do. And I took a mild and
25 modest stab in paragraph three of my own letter to provide a

1 context in which we do admissions knowing that it wouldn't
2 make any difference to him.

3 **Q.** In fact, I wanted to ask you about that. Would you look
4 at the paragraph that you talked about and go to the third
5 paragraph. What you say to him is, "Our ambition to educate
6 future leaders has made Harvard appealing to the most
7 talented and ambitious students across America. As a result
8 the college has been more representative of the ethnic and
9 economic diversity of the country and, the university
10 believes, better positioned to make significant contributions
11 to the country. We have been pleased by our graduates'
12 success and their leadership in their communities and
13 professions following college."

14 That was part of your response, correct?

15 **A.** Yes, it was.

16 **Q.** The polite response that you provided, correct?

17 **A.** Yes.

18 **Q.** Now, so we've looked at the three documents that
19 Mr. Mortara asked you about. Two emails with your daughter
20 and a polite response to an alum, correct?

21 **A.** Yes.

22 **Q.** And incidentally, did the alum's letter have anything to
23 do with an Asian-American applicant to Harvard College?

24 **A.** I do not think so.

25 **Q.** Let me ask you about a different topic he asked you about

1 now which is religious diversity. If an application
2 discloses an applicant's religion and discusses the
3 importance of the religion, as Mr. Mortara discussed his with
4 us, would you take that into account in evaluating the
5 application?

6 **A.** I think we would. Normally we would.

7 **Q.** Do students, in fact, disclose that type of information?

8 **A.** Quite often.

9 **Q.** Is the Harvard campus a religiously diverse campus today?

10 **A.** It is very diverse.

11 **Q.** And have you been able to assemble a religiously diverse
12 class?

13 **A.** I think we have. We do not have data on religion.

14 **Q.** To the extent you have information, is it because
15 applicants have self-disclosed and described the importance
16 themselves, correct?

17 **A.** Yes.

18 **Q.** Next topic, and I'm going to come back to going through
19 some of the issues I want to go through with you on a
20 discipline basis. But I want to before the end of the week
21 take care of a few things Mr. Mortara asked you about.

22 Mr. Mortara asked you about your deposition about
23 alternative ways to achieve racial diversity. Do you
24 remember that? The date of the deposition was June 18, 2015?

25 **A.** Yes.

1 Q. And your answers were correct as of that time?

2 A. Yes.

3 Q. Has there been the issuance of a report by race neutral
4 alternatives committee after the date of your deposition?

5 A. I have heard that there was, yes.

6 Q. And that was by the college, correct?

7 A. Yes.

8 Q. Now, let me go and ask you to look at PX220 which
9 Mr. Mortara also asked you about. I just want to talk about
10 a couple of things that he didn't review with you. Tell me
11 when you're there.

12 A. 220, yes.

13 Q. 220. Do you have that before you?

14 A. I do.

15 Q. Now, he covered some portion of this. I'd like to sort
16 of complete the picture if we could. In the email that you
17 actually drafted yourself, that's in the second half of the
18 first page, correct?

19 A. Yes.

20 Q. And I want to be sure first we have the correct reading
21 of the sentence that refers to the OCR report. Do you see
22 the sentence that reads, "And we have". We'll highlight it
23 here.

24 A. Yes. I see that sentence.

25 Q. And would you read that sentence?

1 **A.** "And we have had been examined by OCR most fully about 20
2 years back when we had a full compliance review about
3 Asian-American bias which resulted in a very gratifying
4 finding of approbation. It appears that that chapter is
5 known to this author."

6 **Q.** The word is approbation rather than probation, correct?

7 **A.** Correct.

8 **Q.** Now, go to the next paragraph.

9 **A.** Yes.

10 **Q.** I'm going to bring your attention to the last sentence of
11 your email, and this follows a sentence or two that
12 Mr. Mortara asked you about. Do you see the portion that
13 reads, "We do not run a single-factor admissions system. Nor
14 do we have any interest in inner and outer rings, etc. We
15 look for the people with the most promise for the future and
16 we make every decision on the basis of achievement in the
17 context of what an applicant has done and what he has had,
18 etc."

19 Have I read that correctly?

20 **A.** Yes.

21 **Q.** Is that, in fact, true?

22 **A.** Yes.

23 **Q.** And has it been consistently true during the period of
24 time that you have been the director of admissions?

25 **A.** During my time, yes.

1 **Q.** Director McGrath, you began working at Harvard in what
2 year?

3 **A.** My first professional job began in 1978.

4 **Q.** And when did you become the director of admissions?

5 **A.** In 1987.

6 **Q.** Do you serve as the chair of any dockets today?

7 **A.** Yes. Two dockets.

8 **Q.** Which dockets are you the chair of?

9 **A.** B which is the Mountain West, not California. And the
10 other docket is T which is New York City and Westchester
11 County and Rockland County.

12 **Q.** What are your duties and responsibilities as the docket
13 chair?

14 **A.** The chairman of the docket organizes and leads the review
15 of candidates. I'm the final reader, at least the senior
16 reader, of all of the candidates who will be discussed in the
17 committee. I do a good deal of work with the alumni who in
18 New York City especially do a lot of recruitment, and we're
19 trying to do more of that in the west.

20 And I also organize and chair and lead the
21 committee discussions of candidates for admission and various
22 other duties as well.

23 **Q.** When you read applications as the docket chair, do you
24 assign ratings?

25 **A.** Yes.

1 **Q.** Has a first reader also assigned ratings?

2 **A.** Yes.

3 **Q.** Now, Her Honor has heard a great deal about the ratings
4 from Dean Fitzsimmons. Let me just ask you a few questions
5 that go to questions Mr. Mortara asked you about.

6 Does Harvard consider the personal qualities and
7 characteristics of the candidates in the admissions process?

8 **A.** Yes, we do.

9 **Q.** And why?

10 **A.** Well, we're aware, for one thing, that we will be
11 bringing into Harvard individual people, not records of
12 achievement. We want to invest our opportunities in people
13 who have -- seem likely to us -- of course this is a
14 projection. Who seem likely to us to use their talents and
15 education for the benefit of society.

16 We're really firm about hoping for that and hoping
17 to identify those people. Personal qualities are part of
18 that calculation on our part.

19 **Q.** What are the sources of information you use to make that
20 judgment?

21 **A.** Well, there are a number of sources. The first one is
22 chronologically in reading a folder, the first one you
23 encounter is the student's own self-presentation, whatever
24 she said in her essay, what whatever she says about her
25 interests, whatever she characterizes as important. She

1 starts the reading process for us or he, we start where the
2 candidate is.

3 In addition to that there are a number of other
4 sources or voices in the folder. There are teacher letters,
5 a couple typically, maybe more. There is a letter from
6 somebody representing the school. It could be the guidance
7 counselor, the headmaster, whoever writes for students who
8 are heading out.

9 We often have letters in the folder from the rabbi
10 or the boss or the grandfather's best friend or godfather.
11 We have lots of people who feel encouraged to write to us
12 about candidates for admission. We may have the opinions of
13 coaches, either their coach or our coach, or the music
14 teacher.

15 And we normally have also, we always have, some
16 kind of report from the interviewer, typically the alumni
17 interviewer who helped us. There may be other voices, too.
18 But there are lots of people from outside the Harvard world
19 who are giving us their impression of any aspect they want to
20 talk about about any candidate.

21 **Q.** Now, Mr. Mortara asked you some questions about the role
22 of race in the different ratings. Do you recall that?

23 **A.** Yes.

24 **Q.** And I think I wrote down correctly your answer was "race
25 alone" is or is not a factor?

1 **A.** Yes.

2 **Q.** The phrase you used was "race alone", correct?

3 **A.** That was of the phrase I used.

4 **Q.** Let me ask you these questions. Does the applicant's
5 race alone factor into the personal rating?

6 **A.** No, it should not.

7 **Q.** The does an applicant's race alone factor into any of the
8 profile ratings?

9 **A.** No, it should not.

10 **Q.** Does an applicant's race alone factor into the
11 preliminary overall rating?

12 **A.** It may be a factor, in a good case we may be adding that
13 into our consideration in the overall rating, yes.

14 **Q.** Now, can experiences of an applicant that are related to
15 race be reflected or believe considered in assigning a
16 profile rating?

17 **A.** Yes.

18 **Q.** Can you give us an example?

19 **A.** Yes. I'm making this up as I go. A candidate who was
20 the, let's say, only member of his or her race in a school
21 that was predominantly something else and had felt himself --
22 we actually see a number of these candidates -- who felt
23 himself to be marked throughout his school experience as
24 different from other people, and yet, making up this
25 fictional case, may have been elected school body president,

1 might have been valedictorian and felt watched as he achieved
2 those things, may write about it and help us understand
3 persistence, courage, self-confidence.

4 Sometimes the situation that a student was born
5 into is in his narrative part of his explanation of who he is
6 and who he hopes to be and what he's done already.

7 **Q.** Now, Mr. Mortara asked you along the same lines whether
8 there were written directives of precisely how to use race in
9 the process.

10 Do you remember that?

11 **A.** I do.

12 **Q.** He also asked you some questions about whether you were
13 familiar with some of the Supreme Court decisions?

14 **A.** Yes.

15 **Q.** I know you're not a lawyer, but are you familiar with the
16 concept of race being used flexibly and not mechanically?

17 **A.** Yes, I am.

18 **Q.** As opposed to according to some directive?

19 **A.** Right. Yes, I am familiar with that.

20 **Q.** So I want to ask you about that. When you were asked
21 those questions you said to Mr. Mortara that you discussed
22 this quite a bit in training, correct?

23 **A.** Yes.

24 **Q.** Does the admissions office provide training for new
25 admissions officers?

1 **A.** Yes.

2 **Q.** When does that training start?

3 **A.** Well, it starts at the beginning. Their first day of
4 work they're hit with about a month of training in a kind of
5 series of meetings accompanied by an enormous amount of
6 reading. The first month there is intense.

7 **Q.** Are there different phases of the training?

8 **A.** Yes. So the first month is reading and meeting with
9 people and mastering the various aspects of our business. I
10 think of the training period -- I think of the first year as
11 being an apprentice year. I think the first year really does
12 extend -- the first training extends through the year because
13 in a way, our new hires know this, they don't get to do much
14 alone.

15 They read folders, the first 50 folders or so they
16 read are always read by another person after they had read
17 them even if they thought they might not be worthy of further
18 consideration. During the times that they're in committee
19 that first year, they're pretty intensely monitored by the
20 chair of the committee, perhaps by other committee members as
21 well.

22 When they begin to do their group sessions, which
23 is group information sessions where we recruit people who
24 come to Cambridge and we speak with them in groups, we always
25 make sure at the beginning that there's another staff member

1 there to watch and give feedback. It's a feedback-giving
2 process.

3 **Q.** Go ahead.

4 **A.** So some of the most important parts of what people learn
5 in what I think of as an apprentice year are not the kind of
6 thing that we think can be very effectively taught in
7 something in a handbook. Things like the handling of race or
8 the handling of character and personality, the interpretation
9 of family circumstances of various kinds, the assessment of
10 very granular skills, that's stuff that we teach people in
11 conversation over that first year.

12 Staff meetings, subcommittee meetings, specific
13 meetings on topics. We also send around, perhaps too much,
14 but a lot of material to people on topics that are salient to
15 our work. The first year there is a supervised experience.

16 **Q.** We're getting close to 4:00. I want to ask you just a
17 few questions, and then we'll be at a good stopping point for
18 the week.

19 The first is this: There are written materials
20 that you use for the training, correct?

21 **A.** Yes.

22 **Q.** And they include among them the exhibit that Mr. Mortara
23 showed you on how to fill in the numbers, correct?

24 **A.** Yes, they could.

25 **Q.** Is there also an interview handbook?

1 **A.** There is.

2 **Q.** Is there also case books?

3 **A.** Yes.

4 **Q.** Now, as lawyers we're accustomed to being trained by case
5 books. Are they used to train admissions officers?

6 **A.** Yes. They're important.

7 **Q.** Are there guides to how you use the case books?

8 **A.** Yes. There are guides to how to use the case books so
9 that whoever is doing the training can hit all the notes.
10 Yes, there are guides.

11 **Q.** I'm going to next week take you through each so Her Honor
12 can see the training.

13 Are there written guidelines for admissions
14 officers on how to judge someone's integrity?

15 **A.** No written guidelines that I can recall.

16 **Q.** Is there any written guideline on how to judge someone's
17 creativity?

18 **A.** There are guidelines on the process for getting
19 assessments of that which includes faculty reviews, for
20 example.

21 **Q.** But in terms of guidelines that tell you specifically how
22 to judge someone's creativity and incorporate it in the
23 process, is there a written guideline?

24 **A.** Well, my favorite yes response to that, and the only one
25 I can really offer, is a letter that's part of the packet

1 that we give to new people to discuss is a letter from a
2 member of our faculty, Helen Vendler who writes about less
3 tangible creative aspects. And that's a very important
4 document forever for our staff to come to grips with.

5 **Q.** Is there any portion in the handbook that tells someone
6 how to judge someone's grit?

7 **A.** I don't think so specifically directly.

8 MR. LEE: Your Honor, this would be a good place to
9 stop and then I can move to the documents on Monday.

10 THE COURT: Yes, that's fine. Do you want to start
11 at 9:30 or 10 on Monday?

12 MR. LEE: 9:30 would be great if it's possible. I
13 know they want to get Mr. Kahlenberg off and on.

14 MR. MORTARA: 9:30 would be preferable.

15 THE COURT: 9:30 is fine. I think we've moved
16 everything to our afternoon beginning at 3:30.

17 MR. LEE: I think what's going to happen,
18 Mr. Hughes is going to talk about this briefly. We'll
19 interrupt Director McGrath, let Mr. Kahlenberg go on and off,
20 and then we'll bring her back to finish. If that's all right
21 with Your Honor.

22 THE COURT: That's fine with me.

23 (Court recessed at 4:00 p.m.)
24
25

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